Supreme Court, U.S.
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No. OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

PATRICIA KIDD,

Petitioner,

v.

DISTRICT OF COLUMBIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

DANIEL G. JARCHO
Counsel of Record
MICHAEL J. HAUNGS
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioner

72pp

QUESTIONS PRESENTED

1. Whether a district court's dispositive order containing an explanation of the court's reasoning satisfies the "separate document" requirement of Rule 58 of the Federal Rules of Civil Procedure, such that the time for appeal begins to run from the entry of the order.

2. Whether a district court's dispositive order adopting the report and recommendation of a magistrate judge satisfies the "separate document" requirement of Rule 58 of the Federal Rules of Civil Procedure, such that the time for appeal begins to run from the entry of the order.

LIST OF PARTIES

All parties do not appear in the caption on the cover page. A list of all parties to the proceeding in the court of appeals is as follows:

Patricia Kidd

The District of Columbia

Anthony Williams and Marion Barry, each in his official capacity as Mayor of the District of Columbia

John Payton

Marty Grossman

Eugene Adams

Ric Murphy

Lorraine Britton

Lorraine Greene

William Reddick

Timothy Edwards, in his official capacity as Associate Director for Real Property of the Department of Administrative Services of the District of Columbia

Raymond Lambert

Robert King

Warren Cruise

Bruce Marshall, in his official capacity as Director of the District of Columbia Department of Administrative Services of the District of Columbia.

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PETITION FOR WRIT OF CERTIORARI

Patricia Kidd petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit, dismissing her appeal as untimely. A divided panel of the court of appeals ruled that Petitioner filed her pro se notice of appeal eleven days late, holding that her time to appeal ran from the district court's entry of an order dismissing some of her claims. The premise of this holding was that the dismissal order was a judgment entered on a separate document within the meaning of Fed. R. Civ. P. 58.

The majority acknowledged that its decision conflicted with the decisions of three other courts of appeals. When the full court of appeals later denied a petition for rehearing en banc by a 5-4 vote, the four dissenting judges issued a statement that the case raised "a question of exceptional importance" because "the panel decision will produce precisely the kind of uncertainty and potential loss of appeal rights that Rule 58 was intended to prevent." (App. 30a.) Petitioner seeks this Court's review to address this important question and resolve the conflict in the circuits.

OPINIONS BELOW

The D.C. Circuit's decision (App. 1a) is reported at 206 F.3d 35 (D.C. Cir. 2000), and the order denying rehearing en banc with a dissenting statement (App. 28a) is published at 214 F.3d 179 (D.C. Cir. 2000). The orders of the United States District Court for the District of Columbia (App. 22a, 24a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 2000. Petitions for rehearing and for rehearing en banc were denied on June 2, 2000. (App. 26a, 27a, 28a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

RULES INVOLVED

Rule 58 of the Federal Rules of Civil Procedure provides in pertinent part:

> Subject to the provisions of Rule 54(b): (1) upon a general verdict of a jury, or upon a decision by the court that a party shall recover only a sum certain or costs or that all relief shall be denied, the clerk, unless the court otherwise orders, shall forthwith prepare, sign, and enter the judgment without awaiting any direction by the court; (2) upon a decision by the court granting other relief, or upon a special verdict or a general verdict accompanied by answers to interrogatories, the court shall promptly approve the form of the judgment, and the clerk shall thereupon enter it. Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth and when entered as provided in Rule 79(a). . . .

Rule 4(a) of the Federal Rules of Appellate Procedure provides in pertinent part:

> **(1) Time for Filing a Notice of Appeal.**
>
> **(A)** In a civil case, except as provided in Rules 4(a)(1)(B), 4(a)(4), and 4(c), the notice of appeal required by Rule 3 must be filed with the district clerk within 30 days after the judgment or order appealed from is entered.

STATEMENT OF THE CASE

A. The History And Purpose Of The Rule 58 "Separate Document" Requirement

Rule 58 performs an extraordinarily important function in the federal judicial system, because it defines when the jurisdictional time limits on a civil appeal begin to run. Rule 58 provides that a final appealable judgment is "effective only when" it is "set forth on a separate document." Fed. R. Civ. P. 58. Thus, the jurisdictional appellate deadlines dictated by Fed. R. App. P. 4 do not begin to run until the district court enters judgment in this manner.

Because a district court can dispose of a case in a variety of ways, a number of different types of orders may be issued during the concluding stages of litigation. Litigants must know which order represents the final judgment in order to protect their appeal rights. As the Court explained in granting certiorari in an earlier Rule 58 case, this seemingly mundane procedural issue is fundamentally important:

> A conflict on an issue such as this is of importance and concern to every litigant in a federal court, since, as this case makes clear, the timeliness of appeals, as well as the timeliness of post-trial motions, may turn on the question of when judgment is entered.[1]

1. The Version Of Rule 58 In Effect Before 1963

This Court has granted certiorari to clarify Rule 58's requirements on several occasions during the past fifty years. In *United States v. F. & M. Schaefer Brewing Co.*, the Court

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[1] *United States v. Indrelunas*, 411 U.S. 216, 217-18 (1973) (granting certiorari).

considered whether the government's time to appeal ran from the date the clerk filed an opinion granting summary judgment in favor of a taxpayer, or from the subsequent date when the district judge signed "a formal document captioned 'Judgment.'" 356 U.S. 227, 229 (1958). Under the version of Rule 58 in effect at the time, the law was settled that no particular "form of words . . . is necessary to evince [the] rendition [of a judgment]." *Id.* at 232 (quoting *United States v. Hark*, 320 U.S. 531, 534 (1944)). Rather, to determine whether the earlier opinion embodied a "final decision," the Court applied a subjective test—whether "the judge has or has not clearly declared his intention in this respect in his opinion." *Id.* at 232. Because the district court's opinion had not specified the amount of interest to be awarded, or even a method for calculating it, neither the judge, the clerk, nor the appellee "understood the opinion to be the judge's final act or to constitute his final judgment in the case." *Id.* at 235-36. The Court held that under the specific facts of that case, the time to appeal began to run from the entry of the formal judgment, not the earlier opinion. *Id.* at 236.

2. The Adoption Of A "Separate Document" Requirement In 1963

The government had argued in *Schaefer Brewing* "that practical considerations require that a final judgment be contained in a separate document so labeled." 356 U.S. at 231. The Court rejected this argument: "Whatever may be the practical needs in these respects, the answer is that no present statute or rule so requires . . . ." *Id.* at 232. However, in 1963, Rule 58 was amended to essentially its present form, containing the sort of "separate document" require-

ment the government had sought in *Schaefer Brewing*.[2]

The advisory committee explained that the change was motivated by the fact that in the past, "some difficulty has arisen, chiefly where the court has written an opinion or memorandum containing some apparently directive or dispositive words, e.g., 'the plaintiff's motion [for summary judgment] is granted.'"[3] Such ambiguous documents confused both litigants and courts as to when judgment was entered and the time for appeal commenced to run:

> Clerks on occasion have viewed these opinions or memoranda as being in themselves a sufficient basis for entering judgment in the civil docket as provided by Rule 79(a). However, where the opinion or memorandum has not contained all the elements of a judgment, or where the judge has later signed a formal judgment, it has become a matter of doubt whether the purported entry of judgment was effective, starting the time running for post-verdict motions and for the purpose of appeal.

Id. The advisory committee explained that the Rule was intended to clarify what constitutes a judgment by requiring that it be separate and distinct from other documents:

> The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document—distinct from any opinion or memo-

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[2] Rule 58 was amended again in 1993, but only with respect to the effect of motions for attorneys fees. *Compare* 28 U.S.C. Appendix, at 783-84 (1994) (current version of Rule 58) *with* 28 U.S.C. Appendix, at 672 (1988) (pre-1993 version of Rule 58).

[3] Fed. R. Civ. P. 58, Notes of Advisory Committee on Rules—1963 Amendment, 28 U.S.C. Appendix, at 784-85 (1994) (citing *Schaefer Brewing*).

> randum—which provides the basis for the entry of judgment. That judgment shall be on separate documents is also indicated in Rule 79(b) . . . .

Id.

Notwithstanding the clarifying change to Rule 58, ten years later the Court again granted certiorari to explain what action by a district court constituted final judgment from which the time for appeal ran. In *United States v. Indrelunas*, 411 U.S. 216 (1973), the Court held that the time for appeal began to run from the entry of a formal judgment and not from the earlier date of a jury verdict. Citing *Schaefer Brewing* as an example, the Court explained that "[p]rior to 1963, there was considerable uncertainty over what actions of the District Court would constitute an entry of judgment, and occasional grief to litigants as a result of this uncertainty." *Id.* at 220. Rule 58 had been amended "to require that a judgment was to be effective only when set forth on a separate document" in order to "eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter." *Id.* The Court explained that the separate document requirement "is, as Professor Moore states, a 'mechanical change' that must be mechanically applied in order to avoid new uncertainties as to the date on which a judgment is entered." 411 U.S. at 221-22 (citing 6A James Wm. Moore, *Federal Practice* ¶ 58.04 [4.-2], at 58-161 (1972)).

3. The Court's Limited Waiver Of The "Separate Document" Requirement

The Court has countenanced only one departure from the "mechanical" application of the Rule 58 separate document requirement. In *Bankers Trust Co. v. Mallis*, the Court held that the "parties to an appeal may waive the separate judgment requirement of Rule 58." 435 U.S. 381, 387 (1978). The Court reaffirmed the holding of *Indrelunas* that "the

separate-document rule must be 'mechanically applied' in determining whether an appeal is timely," but explained that "[t]he need for certainty as to the timeliness of an appeal . . . should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered." *Id.* at 386. A separate document need not be required unless it is necessary to protect appeal rights:

> Certainty as to timeliness, however, is not advanced by holding that appellate jurisdiction does not exist absent a separate judgment. If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal. Upon dismissal, the district court would simply file and enter the separate judgment, from which a timely appeal would then be taken. Wheels would spin for no practical purpose.

Id. at 385. Rule 58, the Court held, "should be interpreted to prevent loss of the right of appeal, not to facilitate loss." *Id.* at 386.

This Court has not returned to address the requirements of Rule 58 since it decided *Bankers Trust* twenty-two years ago. During the interim, the lower courts have divided over how to distinguish orders that do not cause the appeal time to run from similarly phrased judgments that do. In addition, an intractable circuit conflict has developed on the specific question whether a district court order adopting a magistrate judge's report and recommendation can ever constitute a Rule 58 "separate document." It is these important questions that now require clarification by the Court.

B. This Litigation

Petitioner Kidd filed this action, pro se, charging that various actions by her employer, the District of Columbia's Department of Administrative Services, constituted retaliation for her prior successful sexual harassment lawsuit

against her supervisors. Following a trial in the prior suit, she was awarded some $300,000 in compensatory and punitive damages for sexual harassment and intentional infliction of emotional distress. When she returned to work immediately after the trial, she was placed back under the supervision of the very same individuals who had just been found personally liable to her. The retaliatory actions of these individuals, and the strain of the hostile work environment, compelled Petitioner to file this case. (*See* App. 3a.)

The district court dismissed some of Petitioner's claims in August 1994, and directed her to replead her Title VII and constructive discharge claims with greater specificity. (App. 22a.) The court of appeals dismissed Petitioner's appeal from this order on the ground that it was interlocutory.[4] Petitioner filed an amended complaint, and also filed a separate action under the Rehabilitation Act. (*See* App. 3a.) The district court consolidated the two actions and referred the matter to a magistrate judge. (*Id.*)

The parties filed dispositive motions in 1997, and the magistrate judge issued a report and recommendation that summary judgment should be entered in favor of Respondents. (App. 3a-4a.) Petitioner timely filed objections to the magistrate judge's report and recommendation. (App. 4a.) In a document captioned "Order," filed March 20, 1998, the district court denied these objections, holding that "Plaintiff still fails to raise any genuine issues of material fact in this recent filing and does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report and Recommendation." (App. 24a.) The district court also entered several other orders on that same date, but it did not

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[4] *See Kidd v. District of Columbia*, No. 94-7177, 1995 WL 118021 (D.C. Cir. Feb. 7, 1995) (holding that Aug. 3, 1994 order was not final).

enter any document captioned "judgment."

Petitioner did not receive immediate notice of the order granting summary judgment, nor did she obtain a copy of it until she personally obtained one from the district court on April 28, 1998. (App. 4a, 33a, 37a.) On April 30, 1998, forty-one days after entry of the order, Petitioner filed a pro se Notice of Appeal from "all orders" entered against her in both of the consolidated cases. (App. 32a.)

C. The Court Of Appeals Dismissal

After full briefing and argument, a divided panel of the court of appeals dismissed the appeal as untimely.[5] (App. 1a-11a.) The court held that the time to appeal ran from the date the district court entered its order adopting the magistrate judge's report and recommendation. Petitioner, proceeding pro se, had filed her appeal forty-one days after that order. Because Fed. R. App. P. 4(a)(1)(A) requires filing the notice within thirty days after judgment, the court held that the appeal was untimely. (App. 4a.)

The majority expressly recognized that its decision conflicted with decisions of other circuits, stating that "[i]n the wake of *Shalala v. Schaefer*, 509 U.S. 292 (1993), however, a number of circuits have concluded that orders adopting magistrate's reports cannot serve as judgments for purposes of Rule 58." (App. 7a.) The majority rejected the reasoning of these decisions, stating that it was "uncertain how [they] can be extracted from *Schaefer*." (App. 8a.)

The majority also addressed how to distinguish a Rule 58 separate document from other orders the district court may

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[5] Because Petitioner was proceeding pro se, the court of appeals appointed McKenna & Cuneo, L.L.P. to participate as *amicus curiae* in support of her position. The firm now represents Petitioner in this Court.

enter. The majority stated that "at some point, the inclusion of legal reasoning and authority makes an order into a combined decision and order," and not a judgment, but that in a judgment "some explanation is acceptable—so long as it is very sparse." (App. 6a.) (quoting *Diamond v. McKenzie*, 770 F.2d 225, 230 n.10 (D.C. Cir. 1985)). The court held:

> Under *Diamond*, the order here is a Rule 58 judgment. Apart from a reference to the motions being decided, and one conclusory sentence of justification, it consists simply of ordering clauses. It is even free of the single citation to authority that *Diamond* allows.

(App. 7a.)

The majority emphasized that "when a district court enters its final order disposing of the remaining claims in a case before it, it should ideally enter a second, separate document specifically labeled 'judgment' corresponding as closely as possible to Forms 31 and 32 attached to the Federal Rules of Civil Procedure," and suggested that "pro se litigants be given a simple form explaining the timing requirements for appeal when a final adverse judgment is entered." (App. 10a-11a) (citing *Moore v. South Carolina Labor Bd.*, 100 F.3d 162, 164 (D.C. Cir. 1996)). But these suggestions came too late to benefit Petitioner's pro se appeal. The court held that the order adopting the magistrate judge's report and recommendation "qualifies as a judgment under Rule 58," and therefore dismissed the appeal. (App. 10a.)

Judge Tatel dissented from the panel's decision. (App. 12a-21a.) Judge Tatel found the majority's definition of "separate document" under Rule 58 unworkable:

> The standard my colleagues now adopt—an order is a Rule 58 judgment so long as it contains only 'sparse' reasoning, Maj. Op. at 6—will require this court, contrary to the Supreme Court's warning against

> "case-by-case tailoring of the 'separate document' provision," *Indrelunas*, 411 U.S. at 221, to develop a common law of "sparseness."

(App. 17a.) Instead, Judge Tatel would adopt a "bright line" rule: "Orders containing the district court's reasoning, three sentences or one, several citations or none, are not judgments within the meaning of Rule 58." (App. 17a.) "Such a procedure," said Judge Tatel, "would provide the certainty Rule 58 demands, prevent accidental loss of appeal rights, and ensure that this court will never again have to address this issue." (*Id.*)[6]

Petitioner (proceeding pro se) and *amicus curiae* McKenna & Cuneo, L.L.P. filed timely petitions for rehearing and rehearing en banc. The panel denied rehearing, and by a 5-4 vote, the full court of appeals denied rehearing en banc. (App. 26a-30a.) The four dissenting judges—Chief Judge Edwards and Judges Sentelle, Tatel, and Garland—stated that the case raised "a 'question of exceptional importance' because the panel decision will produce precisely the kind of uncertainty and potential loss of appeal rights that Rule 58 was intended to prevent." (App. 30a.)

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[6] Having found the appeal timely, Judge Tatel went on to conclude that the case should be reversed on the merits:

> Even a cursory review of Kidd's *pro se* filings should have demonstrated to the magistrate judge who disposed of Kidd's case in three conclusory sentences that Kidd's primary allegation—that she was denied a promotion by the very District of Columbia officials against whom she had just won a substantial verdict for intentional infliction of emotional distress stemming from sexual harassment and forced sodomy by her supervisor—presented a strong prima facie case of retaliatory failure to promote as well as sufficient evidence of pretext to survive summary judgment.

(App. 17a.)

REASONS FOR GRANTING THE PETITION

The issue in this case is a vital one upon which the right of appeal in civil litigation may turn: Whether a district court order dismissing a case and containing some legal reasoning satisfies the requirement of Rule 58 that "[e]very judgment shall be set forth on a separate document." Fed. R. Civ. P. 58. Although the Court has addressed the need for a separate document under Rule 58 several times, it has yet to clarify the contents of such a separate document so that litigants may distinguish a final judgment, which initiates the running of jurisdictional appellate time limits, from other orders in a civil case.

The circuits are in direct conflict as to the specific issue raised by this case: whether a brief order adopting the report and recommendation of a magistrate judge satisfies Rule 58, or whether an additional, "separate document" must also be entered for the appeal time to run. More generally, uncertainties about the form and content of a Rule 58 separate document have caused discord and confusion among the circuits, of which this case is but one example.

In dissenting from the denial of rehearing en banc, four judges of the D.C. Circuit believed the issues raised by this case to be of "exceptional importance," and predicted that the panel decision would "produce precisely the kind of uncertainty and potential loss of appeal rights that Rule 58 was intended to prevent." (App. 30a.) This Court should grant certiorari to resolve a direct conflict in the courts of appeals concerning the application of Rule 58 to an order adopting a magistrate judge's report and recommendation, and to end the lower courts' general confusion as to what documents do and do not satisfy Rule 58.

I. THE DECISION BELOW DIRECTLY CONFLICTS WITH THE DECISIONS OF OTHER COURTS OF APPEALS

The D.C. Circuit's decision establishes a mature conflict among the circuits concerning the "separate document" requirement of Rule 58. In holding that an order adopting the report and recommendation of a magistrate judge satisfies the requirements of Rule 58 and causes the time to appeal to begin running, the D.C. Circuit has deepened a split among six other circuits that requires this Court's resolution. The D.C. Circuit expressly acknowledged this split, recognizing that its decision conflicted with "a number of circuits [that] have concluded that orders adopting magistrate's reports cannot serve as judgments for purposes of Rule 58." (App. 7a.)

A. Decisions Of The D.C., Fifth, Eighth And Tenth Circuits Conflict Directly With Decisions Of The Third, Ninth And Eleventh Circuits

The D.C. Circuit's holding that an order adopting a magistrate judge's report and recommendation can qualify as a Rule 58 judgment on a "separate document" agrees with the law of the Fifth Circuit, which the D.C. Circuit cited with approval. (App. 9a.) As the Fifth Circuit explained: "The mere fact that the first sentence of the order adopts the magistrate's report and recommendation, does not require that two documents be used by the district court rather than one." *United States v. Perez*, 736 F.2d 236, 237 (5th Cir. 1984). The Eighth Circuit in *Mason v. Groose*, and the Tenth Circuit in *Laidley v. McClain*, also have held that an order adopting a magistrate's report and recommendation can be a

Rule 58 "separate document." [7]

However, the Third, Ninth, and Eleventh Circuits have reached the opposite conclusion, holding that an order adopting a magistrate judge's report and recommendation does *not* satisfy Rule 58 alone, but rather requires entry of another judgment document to begin the running of the time for appeal. These circuits base their reasoning on *Shalala v. Schaefer*, 509 U.S. 292 (1993).[8] The Court's opinion in *Shalala v. Schaefer* did not expressly discuss orders adopting the reports and recommendations of magistrate judges. However, in *Newsome v. Shalala*, the Eleventh Circuit quoted the petition for certiorari in *Shalala v. Schaefer*, which revealed that the order found not to satisfy Rule 58 in that case was one adopting the report and recommendation of a magistrate judge. 8 F.3d 775, 779 n.19 (11th Cir. 1993). Finding that the facts in *Newsome* were "identical to those presented in the Supreme Court's recent decision in *Shalala v. Schaefer*," the Eleventh Circuit held that a brief order

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[7] *See Mason v. Groose*, 942 F.2d 515, 516 & n.2 (8th Cir. 1991) (order adopting magistrate judge's report and recommendation constituted a "separate document"); *Laidley v. McClain*, 914 F.2d 1386, 1390 (10th Cir. 1990) ("The fact that the first sentence of the order adopted the report of the magistrate does not require that two documents be used instead of one.").

[8] *Shalala v. Schaefer* concerned the requirement that a claim for attorneys fees under the Equal Access to Justice Act ("EAJA") must be filed within thirty days after a judgment becomes "not appealable." 509 U.S. 292, 293-94, 302 (1993) (discussing 28 U.S.C. § 2412(d)). In *Schaefer*, the Court held that a fee application was timely because the district court had never entered a "formal judgment" in conformity with Rule 58, and thus its decision remained appealable: "Absent a formal judgment, the District Court's April 4 order remained 'appealable' at the time that Schaefer filed his application for EAJA fees, and thus the application was timely under § 2412(d)(1)." 509 U.S. at 303.

adopting the report and recommendation of a magistrate judge did not satisfy Rule 58. *Id.* at 776, 780.

The Ninth Circuit subsequently relied on *Newsome* to hold that an order which "consists only of a district court's adoption of magistrate's recommendation is not a separate document for Rule 58 purposes." *Yang v. Shalala*, 22 F.3d 213, 216 (9th Cir. 1994). Similarly, in *Kadelski v. Sullivan*, the Third Circuit held that an order adopting a magistrate judge's report and recommendation could not be a Rule 58 "separate document." 30 F.3d 399 (3d Cir. 1994). Following *Newsome* and *Yang*, the Third Circuit concluded that *Mason v. Groose*, *Laidley v. McClain*, and *U.S. v. Perez* had been overruled by *Shalala v. Schaefer*, "which involved a remand order precisely similar to this case adopting the Report and Recommendation of a magistrate judge, and in which the Court held that such order does not satisfy Rule 58 unless a separate document of judgment is entered." *Kadelski*, 30 F.3d at 402.

Thus, seven circuits have now considered the question whether an order adopting a magistrate judge's report and recommendation can be a "separate document," and they have come to diametrically opposite conclusions. The Fifth, Eighth, Tenth and D.C. Circuits have held that a brief order adopting the report of a magistrate judge can constitute a "separate document" under Rule 58. But the Third, Ninth, and Eleventh Circuits have held, based on *Shalala v. Schaefer*, that such an order *cannot* satisfy Rule 58.[9] Nor

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[9] *Newsome* concludes with a statement that the "holdings in this opinion are confined to Social Security cases." 8 F.3d at 780. However, given that Social Security cases are governed by the same Federal Rules of Civil Procedure as other lawsuits, it is not clear how the holding could be limited to that class of cases.

can these cases be distinguished on their facts; the orders held not to satisfy Rule 58 in *Kadelski*, *Yang*, and *Newsome* are comparable in form to the order that the court below held was a "separate document."[10]

This direct conflict, explicitly acknowledged by the majority opinion below, is unlikely to be resolved without intervention by the Court. The decisions at issue span a sixteen-year period, and there is no sign of any attempt by the lower courts to reconcile the conflict. Furthermore, the circuit split is deeply ingrained in the lower courts' jurisprudence because they disagree fundamentally about whether this Court already has spoken to the issue, in *Shalala v. Schaefer*. Recognizing that its decision conflicts with *Kadelski*, *Yang*, and *Newsome*, the court below professed itself "uncertain how these decisions can be extracted from *Schaefer*," which, according to the D.C. Circuit, "rested on the Court's assumption—entirely valid in view of the positions of the parties—that the order's compliance with Rule 58 was not before it." (App. 8a.) *Shalala v. Schaefer*, it said, "cannot be read as having resolved the question of whether the adoption of a magistrate's report prevents an order from serving as a judgment." (*Id.*) By contrast, the Third, Ninth, and Eleventh Circuits read *Shalala v. Schaefer* as dictating the opposite result. Because the circuits base their decisions on different readings of the Court's decision in *Shalala v. Schaefer*, which says nothing explicitly about the question at issue, they are unlikely to resolve the conflict without guidance from this Court. Thus, the conflict is fully mature and

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[10] *See Kadelski*, 30 F.3d at 400 n.1 (quoting order); *Yang*, 22 F.3d at 216 (characterizing order as a "terse, *pro forma* document that did not contain any analysis of the issues, but merely adopted the magistrate's recommendation"); *Newsome*, 8 F.3d at 776 (quoting order).

ripe for resolution by the Court.

B. The Issue Giving Rise To The Conflict Has Profound National Significance

The question whether an order adopting a magistrate judge's report and recommendation may serve as a "separate document" has profound national significance. This Court has made clear as a general matter that conflicts as to what constitutes entry of judgment under Rule 58 are fundamentally important: "A conflict on an issue such as this is of importance and concern to every litigant in a federal court, since, as this case makes clear, the timeliness of appeals, as well as the timeliness of post-trial motions, may turn on the question of when judgment is entered." *Indrelunas*, 411 U.S. at 217-18. Thus, the Court has previously granted certiorari "[b]ecause of an asserted conflict among the circuits and the public importance of the proper interpretation and uniform application of the provisions of the Federal Rules governing the time within which appeals may be taken from the judgments of District Courts . . . ." *Schaefer Brewing*, 356 U.S. at 230-31.

Moreover, the specific procedural context of this case—disposition through the report and recommendation of a magistrate judge—is a commonly recurring one. According to data published by the Administrative Office of the United States Courts, such dispositions have totaled roughly 9,000-10,000 cases nationwide per year, for every year since 1995. During the year ended September 30, 1999, for example, 9,989 matters were disposed of on the report and recommendation of a magistrate judge.[11] The lower courts are in great

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[11] *See* Leonidas Ralph Mecham, *Judicial Business: 1999 Annual Report of the Director*, Tables 5-18 and M-4A, *available at* ‹http://www.uscourts.gov/ judbus1999/ supps.html›.

need of guidance to ensure that cases disposed of through this common procedural mechanism are handled in a manner that preserves appeal rights.

Accordingly, the Court should grant the petition to resolve the conflict in the circuits on the question whether an order adopting a magistrate judge's report and recommendation can be a judgment on a "separate document" under Rule 58.

II. THE QUESTION OF WHAT CONSTITUTES A JUDGMENT UNDER RULE 58 HAS CAUSED DISCORD AMONG THE LOWER COURTS

In addition to the direct circuit conflict described above, this case presents the important, recurring issue of how to distinguish a Rule 58 "separate document" from other documents in a civil case. The separate document requirement of Rule 58 was intended to provide certainty to courts and litigants about what actions by a district court would constitute entry of judgment and begin the running of the time for appeal. The Court has explained that the rule is to be "mechanically applied," *Indrelunas*, 411 U.S. at 221-22, and "should be interpreted to prevent loss of the right of appeal, not to facilitate loss." *Bankers Trust*, 435 U.S. at 386. The Court never has recognized an exception to Rule 58 that resulted in the loss of appeal rights. But in a variety of ways, most of the circuits, including the D.C. Circuit here, have done just that.

Over the course of the two decades since the Court last provided relevant guidance in *Indrelunas* and *Bankers Trust*, the circuits have strayed far from one another as they have struggled to define the contents of a Rule 58 "separate document." Instead of focusing on the requirement of separateness, and hence clarity, the courts of appeals have adopted other standards, such as the length of the document, or whether the district court "intends" to enter final judg-

ment. It is time for the Court to provide corrective guidance and restore Rule 58 to the mechanical device it was intended to be. The Court should grant certiorari to end the lower courts' confusion, and to vindicate the purpose of Rule 58: uniformity and certainty in defining when the time for appeal begins to run.[12]

1. The circuits have disagreed on the extent to which they should identify a "separate document" under Rule 58 by its brevity or its exclusion of reasoning or legal citations. The Second Circuit has held that even a one-sentence document, separate from the court's opinion and containing no legal reasoning or citation, cannot satisfy Rule 58 if it is labeled "order" rather than "judgment."[13] But other circuits have disagreed.

In determining what constitutes a "separate document," a number of circuits have focused on the length of the document. As the Fourth Circuit explained: "In applying the Rule 58 requirement to a given situation, the form and content of the document at issue are determinative. Brevity is an important factor: an order unaccompanied by a long expla-

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[12] The discussion below cites some unpublished circuit decisions that have been provided to the Court under separate cover. The circuits generally disapprove of the citation of their unpublished opinions as circuit precedent. *See* 4th Cir. Rule 36(c); 6th Cir. Rule 28(g); 10th Cir. Rule 36.3. However, such opinions are cited here not as precedent, but only as evidence of the disarray in the circuits.

[13] *Kanematsu-Gosho, Ltd., v. Messiniaki Aigli*, 805 F.2d 47, 49 (2d Cir. 1986). *Accord Cooper v. Town of East Hampton*, 83 F.3d 31, 34 (2d Cir. 1996) ("we have consistently required that such a document must be 'separate from any judicial memorandum or opinion' and 'must be labeled a judgment'") (citation omitted).

nation is likely to be considered a 'judgment.'"[14] Brevity was a factor in some of the decisions discussed above regarding magistrate judges: the Fifth Circuit held the order in *United States v. Perez* to be a judgment because it was "succinct and to the point," and the Tenth Circuit's decision that the order in *Laidley v. McClain* satisfied Rule 58 was based partly on its brevity.[15]

Other cases have focused on the extent to which the document in question cited legal authority. The Fifth Circuit in *Weinberger v. United States* held that "one citation" in an order did not violate the requirement of Rule 58, although "doubtless very little more would have rendered the order vulnerable to appellant's attack."[16] But in *Diamond v. McKenzie*, the D.C. Circuit held that an order that "provided *several* citations to legal authorities" was not a separate document under Rule 58, though "in some instances, an order may be identified as a judgment even though it con-

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[14] *Hughes v. Halifax City Sch. Bd.*, 823 F.2d 832, 835 (4th Cir. 1987). *Accord Martone v. Connecticut Gen'l Life Ins. Co.*, No. 92-1336, 1992 WL 385245, at *1 n.2 (4th Cir. Sept. 11, 1992) (accepting jurisdiction but stating: "Although a very brief order can serve as both the court's decision and the formal judgment required by Rule 58, where, as here, the three page order contains a procedural history of the case and a somewhat lengthy statement of the court's reasoning, it is better classified as the court's opinion than a Rule 58 judgment order.").

[15] *Perez*, 736 F.2d at 237-38; *Laidley*, 914 F.2d at 1390; *see also Woods v. Wal-Mart*, No. 96-1381, 1997 WL 527668, at *2 (10th Cir. Aug. 27, 1997) (interpreting *Laidley v. McClain* as holding that a "brief order adopting [a] magistrate judge's report and granting summary judgment satisfied" Rule 58).

[16] 559 F.2d 401, 402 (5th Cir. 1977) (refusing to vacate judgment for lack of appellate jurisdiction).

tains citations to legal authority."[17] And in this case, the D.C. Circuit held that the order constituted a separate document because it was "even free of the single citation to authority that *Diamond* allows." (App. 7a.)

Courts also have looked to the degree to which the document contains legal reasoning. One justification the Tenth Circuit gave for deciding that the order at issue in *Laidley v. McClain* satisfied Rule 58, and could not be "considered to be an opinion or memorandum," was that it contained absolutely "*no discussion* of the reasoning behind the court's decision."[18] But other circuits have allowed more reasoning. The Ninth Circuit has held that a "one-sentence explanation of the order" does not prevent it from serving as a separate document under Rule 58: "To allow the one-sentence explanation embodied in the order to transform it into an opinion or memorandum rather than an order would be the proverbial elevation of form over substance."[19] Similarly, the First Circuit has approved of a document whose "only departure from perfect purity of form was the addition of a single explanatory sentence," which the court held was "not sufficient to transform the judgment into a memorandum or opinion."[20] And the D.C. Circuit in the

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[17] 770 F.2d at 227, 230 n.10 (emphasis added).

[18] 914 F.2d at 1390 (emphasis added). *See also Clough v. Rush*, 959 F.2d 182, 185 (10th Cir. 1992) ("Generally orders containing neither a discussion of the court's reasoning nor any dispositive legal analysis can act as final judgments if they are intended as the court's final directive and are properly entered on the docket.").

[19] *Hamilton v. Naiki*, 453 F.2d 152, 155 (9th Cir. 1971) (accepting jurisdiction over appeal).

[20] *Nunez-Soto v. Alvarado*, 956 F.2d 1, 2 (1st Cir. 1992) (accepting jurisdiction over appeal).

instant case looked to the fact that the legal reasoning in the order at issue here was "sparse," noting that its precedent "endorses decisions of other circuits allowing inclusion of at least one citation to legal authority and at least a one-sentence explanation of the court's reasoning." (App. 6a) (citing *Diamond v. McKenzie*, 770 F.2d at 230 n.10).

Measuring compliance with Rule 58 by the length of a document, or by how many citations or sentences of reasoning it contains, is unsupported by any clear guiding principle. As Judge Tatel pointed out in dissent in this case, the number of sentences of legal reasoning in a document is quite arbitrary: "Suppose that instead of stating its reasoning in a single sentence, the district court here had broken its one sentence into two . . . . Would this departure from the 'one sentence' rule my colleagues seem to adopt have persuaded them that the order was a combined decision and order?" (App. 15a.) Similarly, Judge Tatel explained why the number of citations can have no logical bearing on whether a document satisfies Rule 58:

> Although this "single citation" standard presumably means that the order would have passed as a Rule 58 judgment even if the district court had cited, for example, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the oft-used authority for Rule 56's summary judgment standard, suppose the district court had also included a citation to one of our cases for the same proposition or even to Rule 56 itself? Would my colleagues then have concluded this was not a Rule 58 judgment?

(App. 15a.) As Judge Tatel succinctly explained: "Rule 58's amendment was intended to end just this type of uncertainty." (App. 15a.)

2. Some circuits have focused on the *intent* of the district court to determine what qualifies as a separate document.

These courts hold that a document satisfies Rule 58 when the district court "intends" that it be a final decision. In relying on the district court's intent, these courts inexplicably follow the approach used in *Schaefer Brewing*, 356 U.S. at 235-36, which was rendered obsolete when the separate document requirement was adopted in 1963. *See supra* at 3-5.

Thus, in *Interfirst Bank Dallas v. Federal Deposit Ins. Corp.*, the Fifth Circuit dismissed as untimely an appeal by the FDIC where the district court had entered no separate document other than an order altering the court's findings and conclusions. 808 F.2d 1105 (5th Cir. 1987). The court based its holding on the fact "[t]he district court order clearly evidenced its intent that the . . . document operate as the final decision in the case. . . . We agree with the district court's reasoning that although Rule 58 should not operate as a trap, it should not be used to give a party the opportunity to cure a procedural error in observing an appellate deadline." 808 F.2d at 1108.[21] Similarly, in *Falls Stamping & Welding Co. v. International Union*, the Sixth Circuit held that a single document satisfied the separate document requirement where "the court's intent was clear, as evidenced by the judge's notation during the pre-trial proceeding."[22]

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[21] In reaching this conclusion, the Fifth Circuit seems also to have interpreted *Bankers Trust*—which held only that an otherwise *timely* appeal need not be dismissed as premature simply because the district court had neglected to file a separate document—as a general license to waive the formalities of Rule 58 and hold an appeal to be *untimely*. The court inexplicably characterized *Bankers Trust* as holding that "an order combining an opinion and a ruling on a motion to dismiss generally satisfied the separate document requirement of Rule 58." 808 F.2d at 1108.

[22] 744 F.2d 521, 526 (6th Cir. 1984). The defendant had claimed that the permanent injunction issued by the district court was a final judgment that prohibited plaintiff from bringing its claim for damages. *Id.* at 525.

(Footnote cont'd on next page)

The Tenth Circuit has held that Rule 58 only requires a separate document "where it is uncertain whether a final judgment has been entered, as where a trial judge writes an opinion or memorandum providing only the basis for the entry of judgment, but containing apparently directive or dispositive words such as 'defendant's motion for summary judgment is granted.'" *United States v. Clearfield State Bank*, 497 F.2d 356, 358 (10th Cir. 1974). Thus, where the "trial judge wrote no opinion or memorandum," and where the district court's language "clearly evidences an intention that the order granting summary judgment constituted a final judgment," the Tenth Circuit held that the order satisfied Rule 58, the appeal time had run, and the district court had properly refused to enter a new judgment. *Id.* at 358-59.[23]

Focusing on the subjective "intent" of the district court is completely inconsistent with both the language and the purpose of Rule 58. Indeed, the separate document requirement

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(Footnote cont'd from previous page.)

Plaintiff argued that a permanent injunction was not a final judgment because, among other things, the district court failed to issue a separate document setting forth a judgment in accordance with Rule 58. *See id.* In holding that the injunction was effective, and the claim for damages precluded, even without a separate document, because the district court's "intent" was clear, the Sixth Circuit interpreted *Bankers Trust* as establishing "the general principle that the requirement of Rule 58 may be waived under certain circumstances," and treated the requirement as "waived" even though one party objected to the finality and form of the document deemed to be a final judgment. *Id.* at 526.

[23] *Accord Woods v. Wal-Mart*, No. 96-1381, 1997 WL 527668, *1-2 (10th Cir. Aug. 27, 1997) ("Rule 58 is not enforced in strictly literal fashion if there is no question about finality; in such a case, the order effecting the challenged disposition may itself constitute the requisite 'separate document.'").

was adopted precisely to create a simple, objective standard. Rule 58 does not permit such "case-by-case tailoring of the 'separate document' provision." *Indrelunas*, 411 U.S. at 221.

3. The circuits in some cases have deemed Rule 58 to be satisfied even where the district court disposed of the claims in a case through a series of orders, so that no single document embodies the complete judgment. The instant case illustrates this problem: the court of appeals here permitted a 1998 order (App. 24a) to serve as a separate document of judgment, even though its status as the case-closing, dispositive document is only apparent when read in context with another document, also captioned "order," that dismissed other claims four years earlier. (App. 22a.).

Other circuits have permitted similarly confusing procedures to satisfy Rule 58. In *Scarfo v. Cabletron Systems, Inc.*, the First Circuit explained that the district court had violated Rule 58 where its "final judgment" consisted of "not one, but a series of orders," which generally were "not self-explanatory" and "refer[red] to an opinion or memorandum of the court to which one must go to understand precisely the meaning of the order." 54 F.3d 931, 936 (1st Cir. 1995). Nevertheless, "[i]n support of our jurisdiction," the court deemed the "sequence of orders" to constitute "the functional equivalent of a 'final judgment'" and accepted jurisdiction over the timely appeal without remanding for entry of a proper judgment. *Id.*

In *Engler v. Township of Spring Valley*, the Sixth Circuit held that an appeal of a denial of qualified immunity was untimely because it should have been taken within thirty days of entry of an order, without waiting for a separate document of judgment. No. 90-3026, 1991 WL 15148, at *2-3 (6th Cir. Feb. 7, 1991). The order in question "cover[ed] a wide variety of separate and independent deci-

sions involved in the ongoing administration of the case," and it indicated that it would be followed within thirty days by a complete opinion explaining the court's reasoning, which in fact was not filed until well over a year later. *Id.* at *2. Although the Sixth Circuit acknowledged that the order in question could not "be readily identified as a final appealable order within the intent of" Rule 58, the court nevertheless held the order "sufficient to start the appellate time running," rendering the appeal untimely. *Id.* [24]

Rule 58 provides that "every judgment shall be set forth on *a* separate document." Fed. R. Civ. P. 58 (emphasis added). It does not provide that cases may be disposed of through a series of orders, however brief. If Rule 58 means anything, surely it means that the disposition of the case must be set forth in a single document that embodies the judgment as to the entire case.

4. The circuits have invented a number of other variations in defining the contents of a Rule 58 "separate document." The Tenth Circuit has held that an "administrative closing order," giving the parties sixty days to reopen the proceedings, "matures into [a] final judgment and, if no action is taken to resolve the case, satisfies the separate document requirement of Rule 58." *Morris v. City of Hobart*, 39 F.3d 1105, 1110 (10th Cir. 1994) (accepting jurisdiction over appeal). Thus, an order whose finality was conditioned on further action by the parties was deemed to constitute the

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[24] To be sure, some courts have refused to allow a series of piecemeal orders to satisfy the separate document requirement. In *Anderson v. Pierce*, the Sixth Circuit remanded a case to district court for entry of a separate document where a series of orders had dismissed portions of a case, so that it was unclear which order should serve as the document from which the time to appeal should run. No. 84-5996, 1985 WL 12815, at *1 (6th Cir. July 19, 1985).

separate document required by Rule 58.

The Third Circuit inexplicably has permitted an order entered in a completely separate, unconsolidated action to serve as a separate document under Rule 58. The district court resolved an appeal from bankruptcy court in the same order in which it disposed of a motion in a separate patent infringement case involving the same parties. *Clausen Co. v. Dynatron/Bondo Corp.*, 889 F.2d 459, 464 (3d Cir. 1989). Although the court of appeals indicated that it "strongly disapprove[d] of the practice of disposing of separate issues in unconsolidated cases by the use of a single order," it nevertheless concluded that "Rule 58 has been complied with sufficiently to treat the order appealed from as a judgment," and accepted jurisdiction over the appeal. *Id.* at 464.

* * *

The Court should grant certiorari here to resolve the disarray and confusion in the circuits over the contents of a Rule 58 "separate document." Rule 58 plays an essential role in informing parties when their time to appeal begins to run. Here, Petitioner's appeal would have been considered timely in some circuits, even though the court below ruled it untimely here. There should be national uniformity on this important issue.

The confusion among the circuits about what constitutes a "separate document" has been building over the twenty-seven years since the Court directed the "mechanical" application of Rule 58 in *United States v. Indrelunas*, 411 U.S. 216 (1973). The circuits show no sign of being able to establish uniformity on their own. The issues raised by this petition deserve the Court's attention, "for surely such a commonplace affair as the time for appeal should not be permitted to breed litigation." *Schaefer Brewing*, 356 U.S. at 251 (Harlan, J., dissenting).

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

DANIEL G. JARCHO
Counsel of Record
MICHAEL J. HAUNGS
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioner

August 30, 2000

APPENDICES

APPENDIX A

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued January 10, 2000 Decided March 24, 2000

No. 98-7075

PATRICIA KIDD,
APPELLANT

v.

DISTRICT OF COLUMBIA, ET AL., APPELLEES

Consolidated with
No. 98-7100

Appeals from the United States District Court
for the District of Columbia
(No. 92cv02897)
(No. 95cv00611)

Michael J. Haungs, appointed by the court, argued the cause as amicus curiae on the side of appellant. With him on the briefs was *Daniel G. Jarcho*.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Patricia Kidd, appearing pro se, was on the briefs for appellant.

James C. McKay, Jr., Assistant Corporation Counsel, argued the cause for appellees. With him on the brief were *Robert R. Rigsby*, Interim Corporation Counsel, and *Charles L. Reischel*, Deputy Corporation Counsel. *Lutz A. Prager*, Assistant Deputy Corporation Counsel, and *Sharlene E. Williams*, Attorney, entered appearances.

Before: SILBERMAN, WILLIAMS and TATEL, *Circuit Judges.*

Opinion for the Court filed by *Circuit Judge* WILLIAMS.

Dissenting opinion filed by *Circuit Judge* TATEL.

WILLIAMS, *Circuit Judge:* Rule 58 of the Federal Rules of Civil Procedure specifies that every "judgment shall be set forth on a separate document" and that "[a] judgment is effective only when so set forth." The Advisory Committee's Note to the 1963 Amendment adding the provision states that its purpose is to eliminate "uncertainties" that occur when a court has written "an opinion or memorandum containing some apparently directive or dispositive words." See also *United States v. Indrelunas*, 411 U.S. 216, 219 (1973) (per curiam). The problem with such combination documents, said the Advisory Committee, was that they left doubt "whether the purported entry of judgment was effective, starting the time running . . . for the purpose of appeal." Under our decisions a single document that disposes of all remaining claims can satisfy Rule 58 so long as it is sufficiently terse. We find that the order in question here satisfied Rule 58. As a result the notice of appeal was filed out of time, and the appeal must be dismissed.

* * *

In October 1990 a jury in the District of Columbia Superior Court awarded Patricia Kidd $300,000 in compensatory and punitive damages on charges that her supervisors at the District of Columbia's Department of Administrative

Services had engaged in discrimination and intentional infliction of emotional distress. Immediately after the trial, Kidd returned to work at the Department under the supervision of some of the defendants who had been found personally liable to her. (In fact the judgments were ultimately paid by the District.) Unsurprisingly, she found the work environment to be tense and hostile. And after the District denied her repeated requests for transfer and promotion, reassigned many of her job responsibilities to other employees, denied her requests for additional training, and gave her what she considered unfair performance evaluations, Kidd resigned from District employment on July 12, 1993.

Kidd complained to the EEOC. It found no evidence of retaliation but issued a right-to-sue letter in September 1992. She filed suit in December 1992. The district court made several attempts to appoint counsel for Kidd, but all failed. After instructing Kidd to proceed pro se, the court entertained the District's motion to dismiss. It construed Kidd's complaint as alleging retaliation and constructive discharge in violation of § 704(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-3(a) (1994), discrimination in violation of the Equal Pay Act, 29 U.S.C. § 206(d), and 42 U.S.C. § 1981, and denial of her constitutional rights to equal protection and due process made actionable under 42 U.S.C. §§ 1983 and 1985. After examining each claim, the court dismissed all counts with prejudice except for the claims of retaliation and constructive discharge, which it instructed Kidd to replead with greater specificity. Kidd included these claims in amended complaints filed in September and October 1994 and filed a complaint in a second suit in March 1995, alleging violation of § 704 of the Rehabilitation Act of 1973, 29 U.S.C. § 794.

The district court consolidated the two actions and referred the case both to mediation and to a magistrate judge. In February 1998, the magistrate issued a report and recom-

mendation in favor of the District's summary judgment motion and against Kidd's motion for partial summary judgment. Kidd filed an objection to the magistrate's report, but the district court adopted the report and granted summary judgment in the District's favor on March 19, 1998. As a consequence, no claim of Kidd's survived.

Kidd appeals from the district court's grant of summary judgment and the dismissal of her other claims. But the threshold problem is the District of Columbia's challenge to our jurisdiction. The District argues that the district court's order of March 19, 1998, stating that the District's "Motion for Summary Judgment . . . is GRANTED," qualified as a judgment under Rule 58, so that Kidd's appeal, filed 41 days after its entry, was untimely under Rule 4(a) of the Federal Rules of Appellate Procedure. We agree and therefore dismiss Kidd's appeal.

* * *

The time limits established by Rule 4(a) are "mandatory and jurisdictional." *Moore v. South Carolina Labor Bd.*, 100 F.3d 162, 163 (D.C. Cir. 1996). Kidd offers two theories either of which, if correct, would moot the Rule 58 issue. She first argues that she has shown good cause for her failure to file within the ordinary appeal period. See Fed. R. App. P. 4(a)(5) ("The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a)."). Kidd points to compelling evidence—indeed, evidence not disputed by the District—that she received no notice of the district court's order until April 14, 1998 at the earliest, and received no copy until April 28. But Rule 4(a)(5) requires appellants to file a motion requesting an extension of time with the district court. Kidd filed no such motion, and therefore Rule 4(a)(5) is inapplicable. Rule 4(a)(6) also provides an avenue of relief for a party receiving notice as belated as was

Kidd's, but also requires a motion asking the district court to reopen the time for appeal. See Fed. R. App. P. 4(a)(6).

Kidd's second theory is that the district court's order failed to satisfy Rule 58's "separate document" requirement, so that the time for appeal never started running. Before looking at the order, we should explain what a document setting forth judgment must be "separate" from. The Advisory Committee Notes to the 1963 amendment say that the "amended rule . . . require[s] that there be a judgment set out on a separate document—*distinct from any opinion or memorandum*—which provides the basis for the entry of judgment." Fed. R. Civ. P. 58, Advisory Committee's Note to the 1963 amendment (emphasis added). They also say that Rule 58 was designed chiefly to distinguish an actual judgment from "an opinion or memorandum containing some apparently directive or dispositive words." *Id.* The Rules insist in other spots on simplicity and brevity in judgments. See Fed. R. Civ. P. 54(a) (" 'Judgment' as used in these rules includes a decree and any order from which an appeal lies. A judgment shall not contain a recital of pleadings, the report of a master, or the record of prior proceedings."); *id.* app. Form 31 Advisory Committee's Note 3 ("The Rules contemplate a simple judgment promptly entered."). In light of all this, we've understood Rule 58 as requiring that "the inclusion of legal reasoning and authority" not go to the point of making "an order into a combined decision and order." *Diamond v. McKenzie*, 770 F.2d 225, 230 n.10 (D.C. Cir. 1985).

In its entirety the order here reads as follows:

ORDER

> Pending before the Court is Magistrate Judge Robinson's Report and Recommendation addressing Plaintiff's Partial Motion for Summary Judgment (Docket No. 174) and Defendants' Motion to Dismiss or in the Alternative for Summary Judgment (Docket No. 175). Plaintiff has filed an objection to this Report and Recommendation.

(Docket No. 219). In her objection, Plaintiff still fails to raise any genuine issues of material fact in this recent filing and does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report and Recommendation. Therefore, it is hereby

ORDERED that Magistrate Judge Robinson's Report and Recommendation dated February 23, 1998 is AFFIRMED by the Court.

Consequently, it is

ORDERED that Defendant's Motion to Dismiss is DENIED, and that Defendant's alternative Motion for Summary Judgment (Docket No. 175) is GRANTED; and it is further

ORDERED that Plaintiff's Partial Motion for Summary Judgment (Docket No. 174) is DENIED.

March 19th 1998 Thomas F. Hogan /s/
United States District Judge

The Supreme Court has said that Rule 58 is to be "mechanically" applied, *Indrelunas*, 411 U.S. at 221-22, and we have understood that as intended to advance the purpose of "avoid[ing] speculation" on the running of the time limits, *Diamond*, 770 F.2d at 230. But it is one thing to say that Rule 58 creates a straightjacket, another to define the straightjacket's precise measurements. Our decision in *Diamond* itself endorses decisions of other circuits allowing inclusion of at least one citation to legal authority and at least a one-sentence explanation of the court's reasoning. See *id.* at 230 n.10. We said that "at some point, the inclusion of legal reasoning and authority makes an order into a combined decision and order," *id.*, confirming that some explanation is acceptable—so long as it is very sparse. Chief Judge Robinson went on to observe in his concurrence that to enforce mechanically did not require enforcing "mindlessly," citing *Weinberger v. United States*, 559 F.2d 401, 402 (5th Cir.

1977), and that "trivial departures [from the official judgment forms, see Fed. R. Civ. P. app. Forms 31, 32] must be tolerated in the name of common sense." *Diamond*, 770 F.2d at 234. He specifically mentioned several examples of trivial departures—not only the inclusion of a single sentence of explanation or citation to authority (both of which were acceptable to the panel), but also "a recital that a magistrate's report and recommendation are being adopted." *Id.* at 234. The latter seems on its face consistent with the "separate document" requirement, as the magistrate's report and recommendation are as separate from the judgment as a district court's opinion.

Chief Judge Robinson also said that "orders combining the court's directives with its statement of factual findings or legal conclusions plainly cannot pass muster as separate documents." *Id.* But in context this statement cannot be read to preclude a single sentence of explanation because the entire panel, with Judge Robinson in full agreement, had already found some minimal amount of legal reasoning to be consistent with Rule 58. See *id.* at 230 n.10. Although our single-citation, single-sentence standard for Rule 58 may well seem arbitrary, see Dissent at 3-5, we think it most proper to follow *Diamond*'s analysis.

Under *Diamond*, the order here is a Rule 58 judgment. Apart from a reference to the motions being decided, and one conclusory sentence of justification, it consists simply of ordering clauses. It is even free of the single citation to authority that *Diamond* allows.

In the wake of *Shalala v. Schaefer*, 509 U.S. 292 (1993), however, a number of circuits have concluded that orders adopting magistrate's reports cannot serve as judgments for purposes of Rule 58. See, e.g., *Kadelski v. Sullivan*, 30 F.3d 399, 400-02 (3d Cir. 1994); *Yang v. Shalala*, 22 F.3d 213, 216 (9th Cir. 1994). The Eleventh Circuit announced a similar rule but explicitly confined its reasoning to Social

Security cases in general and more specifically to "the narrow facts of this case," *Newsome v. Shalala*, 8 F.3d 775, 775, 778-80 (11th Cir. 1993). The Ninth Circuit noted the Eleventh Circuit's caution, but took "no position with regard to this limitation." *Yang*, 22 F.3d at 216 n.5.

We are uncertain how these decisions can be extracted from *Schaefer*. The case dealt with the seemingly endless snarl of district court dispositions under various sentences of 42 U.S.C. § 405(g), and claims for attorneys' fees under the Equal Access to Justice Act ("EAJA"). The Court, after having rejected various arguments of the Social Security claimant as to why his application for attorney's fees was not out of time, finally accepted his claim that the district court had not entered a judgment complying with Rule 58. The Court said that it was "clear from the record" that no " 'separate document' of judgment" had been entered, 509 U.S. at 303, but also explicitly noted that the government had not claimed that the order in question qualified under Rule 58. See *id.* Indeed, confining the issue to a single footnote in its brief, the government had argued only that the claimant had waived his Rule 58 argument and that a Rule 58 judgment was not necessary for appealability to commence. See Brief for Petitioner, 1993 WL 290124, at *19 n.12 (U.S. Jan. 14, 1993). The Court implicitly rejected the waiver idea. As for the appealability argument, it pointed out that under EAJA the issue was not when appealability began (which in practice happens before the time limit on appealability starts to run), see *Schaefer*, 509 U.S. at 303, citing *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385-87 (1978), but rather whether the appealability time limit had run. Thus the decision rested on the Court's assumption—entirely valid in view of the positions of the parties—that the order's compliance with Rule 58 was not before it. It cannot be read as having resolved the question of whether the adoption of a magistrate's report prevents an order from serving as a judgment.

Moreover, as the claimant's contention that there was no Rule 58 judgment rested on its (mistaken) view that there was no judgment at all, see Respondent's Br., 1993 WL 476403, at *8, *23-*24 (U.S. Feb. 18, 1993), his brief sheds no light on the Court's possible thinking.

We note that in fact, under *Diamond*, the *Schaefer* order might well *not* have satisfied Rule 58. (The text is printed in *Newsome*, 8 F.3d at 779 n.19.) The *Schaefer* order contains three sentences of "reasoning," couched in the form of a paraphrase of the magistrate's order. This is almost certainly excessive under *Diamond*.

We also note that Chief Judge Robinson's view—treating an order as Rule 58-qualifying where it recites that a magistrate's report is being adopted—rested on the Fifth Circuit's decision in *United States v. Perez*, 736 F.2d 236, 237 n.3 (5th Cir. 1984). It might be objected that in *Perez* the Fifth Circuit distinguished cases where the district court had granted summary judgment, and arguably confined the decision to the habeas corpus context. But the Fifth Circuit so limited its opinion only because its prior cases had established that a single document granting summary judgment could never satisfy Rule 58's requirements, see *Perez*, 736 F.2d at 237 n.3; *Calmaquip Eng'g West Hemisphere Corp. v. West Coast Carriers, Ltd.*, 650 F.2d 633, 635-36 (5th Cir. 1981); *Nunez v. Superior Oil Co.*, 535 F.2d 324, 324 (5th Cir. 1976) (per curiam), a view hard to reconcile with our acceptance in *Diamond* of judgments containing an order of dismissal, see 770 F.2d at 229-30. Judge Robinson clearly did not qualify his view that a judgment could recite the adoption of a magistrate's report without becoming a memorandum and order, and neither did the Tenth Circuit in *Laidley v. McClain*, 914 F.2d 1386, 1390 (10th Cir. 1990), where it explicitly accepted under Rule 58 a document that granted summary judgment. (In *Laidley* a timely notice of appeal had been filed, and thus the question before the court was whether it

had jurisdiction over a technically premature appeal—an issue that had already been resolved by the Supreme Court in *Bankers Trust*, 435 U.S. at 385-87. But the court stated its interpretation without dependence on that proposition.)

Thus we see no reason to abandon Chief Judge Robinson's view of the natural inferences from the panel's opinion in *Diamond*.

Accordingly the district court's order qualifies as a judgment under Rule 58.[1] We emphasize, however, that when a district court enters its final order disposing of the remaining claims in a case before it, it should ideally enter a second, separate document specifically labeled "judgment" corresponding as closely as possible to Forms 31 and 32 attached

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[1] On finding jurisdiction, our dissenting colleague understandably goes on to examine the merits. But even with an assumption of jurisdiction, defendants' contentions as to Kidd's non-compliance with Local Rule 108(h) pose an obstacle to doing so. Both the district court and the magistrate judge informed Kidd of her obligation under Local Rule 108(h) to provide "a separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated," but the magistrate judge's report concluded that Kidd had not complied with the rule. The rule expressly provides that in the event of non-compliance material facts identified by the opposing side may be deemed admitted. See *Twist v. Meese*, 854 F.2d 1421, 1424-25 (D.C. Cir. 1988). The magistrate judge did not explicitly deem the District's statement of material facts admitted, but she did base her recommendation in part on a finding that Kidd failed to comply with Local Rule 108(h). Compare App. Amicus Curiae 940-41 (finding non-compliance by plaintiff with Local Rule 108(h)), with *id.* at 941-42 (finding defendants entitled to judgment as a matter of law "on the basis of the foregoing findings"). In affirming the magistrate judge's report and recommendation, the district court said that Kidd had neither provided any genuine issue of material fact in her objection to the report nor put forth an argument that would cause the Court to reject the report; it did not explicitly discuss the magistrate's ruling as to Local Rule 108(h).

to the Federal Rules of Civil Procedure.[2] Such a practice would save this court from having to make the kinds of distinctions that Rule 58 sought to eliminate. We have previously suggested that pro se litigants be given a simple form explaining the timing requirements for appeal when a final adverse judgment is entered. See *Moore*, 100 F.3d at 164. The same concerns suggest the wisdom of courts' using judgment forms that lie well within the heartland of Rule 58. But on the present record Kidd's appeal must be

Dismissed.

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[2] The Dissent notes that the judgment here was labeled "Order" rather than "Judgment." Dissent at 3. While we agree that the better practice is to label judgments as such, we have previously said that "a document labeled 'Order' rather than 'Judgment' may satisfy Rule 58 sufficiently to start the appeal clock running, if the order is succinctly to the point, and does not have the characteristics of an elaborate opinion. See *United States v. Perez*, 736 F.2d 236, 237-38 (5th Cir. 1984) (cautioning against "mindless" application of Rule 58)." *Spann v. Colonial Village, Inc.*, 899 F.2d 24, 32 n.4 (D.C. Cir. 1990) (Ruth Bader Ginsburg, J.).

TATEL, *Circuit Judge dissenting:* Although the issue in this case—what precisely constitutes a judgment within the meaning of Rule 58—seems technical, perhaps even formalistic, the stakes are actually quite high. For litigants, knowing with certainty whether a district court has entered a Rule 58 judgment is critically important. Not only does entry of a Rule 58 judgment start the clock for filing a notice of appeal, FED. R. APP. P. 4(a)(1), but a timely notice of appeal is jurisdictional; parties who fail to file a timely notice of appeal because they are unaware that Rule 58 judgments have been entered lose their right to appeal. *See, e.g., Moore v. South Carolina Labor Bd.*, 100 F.3d 162, 163 (D.C. Cir 1996).

"Prior to 1963, there was considerable uncertainty over what actions of the District Court would constitute an entry of judgment, and occasional grief to the litigants as a result of this uncertainty." *United States v. Indrelunas*, 411 U.S. 216, 220 (1973) (per curiam). "To eliminate these uncertainties, which spawned protracted litigation over a technical procedural matter," *id.*, Rule 58 was amended in 1963 to read: "Every judgment shall be set forth on a separate document. A judgment is effective only when so set forth . . . ." FED. R. CIV. P. 58. Known as the "separate document rule," amended Rule 58 makes "clear that a party need not file a notice of appeal until a separate judgment has been filed and entered." *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385 (1978) (per curiam). As the Supreme Court has recognized, the rule change "would be subject to criticism for its formalism were it not for the fact that something like this was needed to make certain when a judgment becomes effective, which has a most important bearing . . . on the time for appeal." *Indrelunas*, 411 U.S. at 220 (internal quotation marks omitted). Accordingly, the Court has held, the Rule must be "mechanically applied in order to avoid new uncertainties." *Id.* at 222.

The Supreme Court has recognized only one exception to

the rule's "mechanical" application. In *Bankers Trust*, the Court confronted the issue whether the absence of a conforming Rule 58 judgment rendered a notice of appeal premature, depriving the appeals court of jurisdiction even though the district court had clearly intended to enter final judgment. Because "[t]he rule should be interpreted to *prevent* loss of the right of appeal, not to *facilitate* loss," the Court held that "[t]he need for certainty as to the timeliness of an appeal . . . should not prevent the parties from waiving the separate-judgment requirement where one has accidentally not been entered." *Bankers Trust*, 435 U.S. at 386 (emphasis added) (internal quotation marks omitted).

Heeding the Supreme Court's directive to apply Rule 58 strictly to protect appeal rights, we have held that "a combined decision and order" cannot serve as a "judgment" within the meaning of Rule 58. *See Diamond v. McKenzie*, 770 F.2d 225, 230 n.10 (D.C. Cir. 1985) (distinguishing between "decisions" of the district court and Rule 58 final judgments). In *Pack v. Burns Int'l Security Svc.*, 130 F.3d 1071, 1071-72 (D.C. Cir. 1997) (per curiam), we found that a document "stating that the motion to dismiss would be treated as conceded and granted" and giving several reasons for dismissal failed to comply with Rule 58. We reached the same conclusion in *Diamond*, 770 F.2d at 229-30, with respect to a document captioned "order" that gave the "basis, albeit briefly, of the court's reasoning, along with citations to legal authorities." The caption and the presence of the court's reasoning (including its citation to authority), we noted, meant that the order differed in "at least two significant respects" from Model Forms 31 and 32, which were passed contemporaneously with the amendment to Rule 58. *Id.* at 229 n.9.

> It is precisely this kind of uncertainty about whether the District Court intended to enter a final order that warrants the mechanical application of Rule 58. By

> mechanically applying this rule, as the Supreme Court has taught us to do, a court may avoid speculation as to whether an appellant should or should not have known that the time for appeal had begun to run.

Id. at 230 (footnote omitted). We concluded: "While we do not mean to suggest that the model form of judgment is the only means of complying with Rule 58, adherence to [that] format . . . would be of considerable assistance in eliminating uncertainty as to the nature of the District Court's action." *Id.* at 229 n.9.

Applying *Diamond* and *Pack* and taking account of Rule 58's purpose, I believe that the district court's order in this case represents a combined decision and order, not a Rule 58 judgment. As in *Diamond*, the order differs from Form 32 in two respects. *See id.* First, it is not labeled "Judgment." Instead, as were fifty-nine other documents issued by the district court and the magistrate judge in this case, some of which did no more than grant extensions of time, it was labeled "Order." Were this the order's only flaw, I would agree with the court that this insignificant departure from the model forms would not prevent us from finding that the order complies with Rule 58. *See* Maj. Op. at 10 n.2. But the order departs from the Model Forms in a second, "most critical[]" *(Diamond's* words) respect: it contains the district court's reasoning. Because Kidd had objected to the magistrate's recommendation and because Fed. R. Civ. P. 72 requires the district court to "make a de novo determination upon the record, or after additional evidence, of any portion of the magistrate judge's disposition to which specific written objection has been made," the district court explained its reasoning: "In her objection, Plaintiff still fails to raise any genuine issues of material fact in this recent filing and does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report and Recommendation."

The only difference I can discern between this order and the order in *Diamond*, which we concluded was a combined decision and order, is that the *Diamond* order contained three sentences of reasoning, not one, together with several citations. In view of Rule 58's purpose—providing certainty—and our obligation to interpret Rule 58 "to *prevent* loss of the right of appeal, not to *facilitate* loss," *Bankers Trust*, 435 U.S. at 386 (emphasis added), these two differences cannot serve as a basis for distinguishing this case from *Diamond*. From a Rule 58 standpoint, the critical point is that the orders in both cases contained the district court's reasoning. It makes no difference that the district court in this case sets forth its reasoning in one sentence whereas the district court in *Diamond* used three. Suppose that instead of stating its reasoning in a single sentence, the district court here had broken its one sentence into two: "In her objection, Plaintiff still fails to raise any genuine issues of material fact[. I]n this recent filing[, she] does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report, and Recommendation." Would this departure from the "one sentence" rule my colleagues seem to adopt have persuaded them that the order was a combined decision and order?

This court also says that the order is a Rule 58 judgment because it lacks even the single citation it reads *Diamond* to permit. Although this "single citation" standard presumably means that the order would have passed as a Rule 58 judgment even if the district court had cited, for example, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), the oft-used authority for Rule 56's summary judgment standard, suppose the district court had also included a citation to one of our cases for the same proposition or even to Rule 56 itself? Would my colleagues then have concluded this was not a Rule 58 judgment? Rule 58's amendment was intended to end just this type of uncertainty.

The court quotes Chief Judge Robinson's admonition that "trivial departures must be tolerated in the name of common sense." *See* Maj. Op. at 6 (quoting *Diamond*, 770 F.2d at 234 (Robinson, C. J., concurring)). I agree. They also point to his statement that an order "does not lose its character as a separate document simply because it includes a one-sentence explanation of what the order is all about, or a recital that a magistrate's report and recommendation are being adopted." *Diamond*, 770 F.2d at 234 (Robinson, C. J., concurring) (footnote omitted). I agree with this too. But the Kidd order goes beyond both "a one-sentence explanation of what the order is all about" and a "recital" that Magistrate Judge Robinson's report and recommendation are being adopted. *Id.* It sets forth the district court's *reasons* for adopting the report. Indeed, Chief Judge Robinson distinguished between the simple recitals he referred to as "trivial departures," *i.e.*, "explanation[s] of what the order is all about," and the court's reasoning: "On the other hand, orders combining the court's directives with its statement of factual findings or legal conclusions plainly cannot pass muster as separate documents." *Id.*

Suggesting that Chief Judge Robinson could not possibly have meant what he said, my colleagues conclude that the sentence "cannot be read to preclude a single sentence of explanation because the entire panel, with Judge Robinson in full agreement, had already found some minimal amount of legal reasoning to be consistent with Rule 58." Maj. Op. at 7. But listen again to Chief Judge Robinson's words. "[S]tatement[s] of factual findings or legal conclusions," he said, "plainly cannot pass muster as separate documents." *Diamond*, 770 F.2d at 234 (Robinson, C. J., concurring). And far from tolerating "minimal" reasoning, the *Diamond* court concluded that the order was not a Rule 58 judgment because it "provid[ed] the basis, albeit briefly, of the court's reasoning, along with citations to legal authorities."

Diamond, 770 F.2d at 229-230.

The standard my colleagues now adopt—an order is a Rule 58 judgment so long as it contains only "sparse" reasoning, Maj. Op. at 6—will require this court, contrary to the Supreme Court's warning against "case-by-case tailoring of the 'separate document' provision," *Indrelunas*, 411 U.S. at 221, to develop a common law of "sparseness." This will in turn produce the very uncertainty and "protracted litigation over a technical procedural matter" that Rule 58's amendment was designed to end. *Id.* at 220.

In my view, litigants, district courts, and this court would be better served by a bright line rule: Orders containing the district court's reasoning, three sentences or one, several citations or none, are not judgments within the meaning of Rule 58. To comply with such a rule, the district court need only instruct its clerk to issue judgments that adhere to the essence of Model Forms 31 and 32. Such a procedure would provide the certainty Rule 58 demands, prevent accidental loss of appeal rights, and ensure that this court will never again have to address this issue.

* * *

Because I would hold that Kidd's appeal is timely, I would reach the merits of her case and reverse. Even a cursory review of Kidd's *pro se* filings should have demonstrated to the magistrate judge who disposed of Kidd's case in three conclusory sentences that Kidd's primary allegation—that she was denied a promotion by the very District of Columbia officials against whom she had just won a substantial verdict for intentional infliction of emotional distress stemming from sexual harassment and forced sodomy by her supervisor—presented a strong prima facie case of retaliatory failure to promote as well as sufficient evidence of pretext to survive summary judgment.

In response, my colleagues offer still another reason why this court cannot reach the merits of Kidd's case. They point

out that the magistrate judge found that Kidd had failed to comply with Local Rule 108(h); citing *Twist v. Meese*, 854 F.2d 1421, 1424 (D.C. Cir. 1988), they also point out that "[t]he rule expressly provides that in the event of non-compliance material facts identified by the opposing side *may* be deemed admitted." Maj. Op. at 9 n.1 (emphasis added). But unlike in *Twist*, where the district court "relied on Rule 108(h) to hold that the material facts identified by the government were deemed admitted," 854 F.2d at 1424, the magistrate judge here chose not to deem the District's facts admitted, much less to rest her summary judgment recommendation on Kidd's failure to comply with Local Rule 108(h). Instead, the magistrate judge considered Kidd's evidence: "[T]he undersigned finds that plaintiff has failed to identify even a single material fact as to which a genuine issue for trial exists. Rather, both her motion and her opposition to defendants' motion are almost entirely comprised of her opinions of defendants' actions and characterizations of various statutes and decisions." The district court likewise did not rely on Local Rule 108(h): "In her objection, Plaintiff still fails to raise any genuine issues of material fact in this recent filing and does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report and Recommendation." Because neither the magistrate judge nor the district court relied on Kidd's failure to comply with the rule, nothing bars this court from reaching the merits of her case.

The D.C. Court of Appeals described the facts leading up to Kidd's sexual harassment lawsuit as follows. Shortly after Kidd began working for the Department of Administrative Services, her immediate supervisor, one Melvin Carter, "began calling her at home and once asked her when she would make love to him." *King v. Kidd*, 640 A.2d 656, 659 (D.C. 1993). "Carter showed Kidd documents demonstrating that she was a probationary employee" and told her that "because

of her probationary status, she could be fired at his recommendation and that no one would question anything." *Id.* He then called her and "ordered her to come to a nearby hotel." *Id.* Kidd hung up, but he called back, reminding her of her probationary status. She went to the hotel where they had sex. *Id.* Carter continued to "pursu[e] her," becoming "angry and loud" when she refused to have sex with him again. Carter also "took away her computer and her clerical assistant." *Id.* at 660. Kidd gave in and again had sex with Carter. "According to Kidd's testimony, Carter . . . forcibly sodomized her, rupturing her anal tissues and causing her to fear AIDS." *Id.*

Kidd complained to Carter's direct supervisor, Robert King, about "stress, harassment and mistreatment." *Id.* Receiving no relief, Kidd filed suit in Superior Court against Carter, King, Raymond Lambert (the director of the Department of Administrative Services), and the District alleging sexual harassment and intentional infliction of emotional distress. A jury found Carter, King, and Lambert personally liable for intentional infliction of emotional distress and Carter liable for sexual harassment as well. The jury awarded Kidd $300,000 in compensatory and punitive damages.

Kidd then returned to work. Believing the environment of the Department to be hostile—King and Lambert, both of whom had been found personally liable to her, were still there—Kidd applied for a transfer. Her request was denied. Kidd also applied for a promotion to a level DS-12. This request also was denied, and record evidence suggests that Lambert, one of the defendants in the Superior Court lawsuit who at the time was personally liable to Kidd for $260,000, took part in the decision to deny the promotion.

To establish a prima facie case of retaliation, Kidd must show that she engaged in activity protected by Title VII, that the District took an adverse employment action against her, and that the adverse action was causally related to the exer-

cise of her rights. *See Cones v. Shalala*, 199 F.3d 512, 521 (D.C. Cir. 1999). Kidd satisfies all three elements of this standard: Her prior sexual harassment lawsuit is protected activity under Title VII; the District failed to promote her; and her evidence of causal connection—that the person denying her the promotion was personally liable to her for $260,000 at the time he denied the promotion—is overwhelming. Indeed, because Kidd's prima facie case "strongly suggests intentional discrimination[, it] may be enough by itself to survive summary judgment." *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1289 n.4 (D.C. Cir. 1998) (en banc). *See also Texas Dep't of Community Affairs v. Burdine*, 450 U.S. 248, 255 n.10 (1981) ("[T]here may be some cases where the plaintiff's initial [prima facie] evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation.").

Even if Kidd's prima facie case standing alone were insufficient, her evidence that the District's asserted nondiscriminatory reasons were pretextual, when considered in combination with the strength of her prima facie case, was enough to preclude summary judgment. *See Aka*, 156 F.3d at 1289 ("Assuming then that the employer has met its burden of producing a nondiscriminatory reason for its actions, the focus of proceedings at trial (and summary judgment) will be whether the jury could infer discrimination from the combination of (1) the plaintiff's *prima facie* case; (2) any evidence the plaintiff presents to attack the employer's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to plaintiff . . ."). Responding to the District's contention that she was not promoted from DS-11 to DS-12 because the Mayor had frozen hiring and promotions, Kidd submitted a sworn statement that her supervisor "requested a waiver of the Mayor's Order to promote another employee." She also stated that "[t]he

freeze apparently was arbitrary because Gary Hicka was brought on board as a DS-12 realty specialist . . . to fill one of the vacant positions." From this evidence that the Department made exceptions to the freeze for other employees, a jury could have concluded that the District's explanation was pretext for retaliation. *See Cones*, 199 F.3d at 519.

The District also claimed that Kidd was unqualified for a promotion to the DS-12 level, but Kidd provided evidence that in her DS-11 position, she performed work normally assigned to DS-12 employees. In fact, the District does not dispute that after a restructuring of the Department, many of the tasks she had been performing were taken from her and reassigned to employees at the DS-12, 13, 14, and 15 levels.

I have no idea whether a jury would have returned a verdict in Kidd's favor. But viewing the record in the light most favorable to Kidd and drawing all inferences in her favor, as we must at this stage of the case, I have no doubt the case should have gone to a jury.

In reaching this conclusion, I recognize the indications in the record that Kidd may have been a difficult plaintiff–the district court tried repeatedly to appoint counsel, and in each instance, counsel withdrew. I also recognize, as the magistrate judge found, that Kidd's *pro se* opposition to defendants' motion for summary judgment was neither succinct nor particularly successful at separating her legal arguments from her factual assertions. In contrast, we have had the benefit of *amicus's* masterful appellate brief. But even without that brief, had the magistrate judge carefully reviewed Kidd's pleadings, as she is required to do in *pro se* cases, *see Haines v. Kerner*, 404 U.S. 519, 520 (1972) (per curiam) (holding *pro se* pleadings to less stringent standards than formal pleadings drafted by lawyers), she too would have seen that Kidd had a strong prima facie case of retaliation and sufficient evidence of pretext to preclude summary judgment.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PATRICIA KIDD,	)	Filed August 3, 1994
Plaintiff,	)	
v.	)	**Civil Action No. 92-2897**
DISTRICT OF COLUMBIA, et al.,	)	
Defendants.	)	

ORDER

For the reasons expressed in the Court's Memorandum Opinion, it is this 3rd day of August, 1994, hereby

ORDERED that the defendants' motions to dismiss are GRANTED in part; and it is further

ORDERED that the plaintiff's claims against the District of Columbia, Mayor Kelly, John Payton, Marty Grossman, Eugene Adams, and Warren Cruise are DISMISSED; and it is further

ORDERED that the plaintiff's claims under the Equal Pay Act of 1964 and 42 U.S.C. § 1981, § 1983, and § 1985 are DISMISSED; and it is further

ORDERED that the defendants' motions to dismiss the plaintiff's Title VII and constructive discharge claims are DENIED without prejudice; and it is further

ORDERED that the plaintiff shall replead her Title VII

and constructive discharge claims with greater specificity by September 1, 1994.

/s/
Thomas F. Hogan
United States District Judge

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PATRICIA KIDD,	)	Filed March 20, 1998
	)	
Plaintiff,	)	
	)	**Civil Action Nos.**
v.	)	**92-2897 &**
	)	**95-0611**
DISTRICT OF COLUMBIA, et al.,	)	**(TFH/DAR)**
	)	
Defendants.	)	

ORDER

Pending before the Court is Magistrate Judge Robinson's Report and Recommendation addressing Plaintiff's Partial Motion for Summary Judgment (Docket No. 174) and Defendants' Motion to Dismiss or in the Alternative for Summary Judgment (Docket No. 175). Plaintiff has filed an objection to this Report and Recommendation. (Docket No. 219). In her objection, Plaintiff still fails to raise any genuine issues of material fact in this recent filing and does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report and Recommendation. Therefore, it is hereby

ORDERED that Magistrate Judge Robinson's Report and Recommendation dated February 23, 1998 is AFFIRMED by the Court.

Consequently, it is

ORDERED that Defendant's Motion to Dismiss is DENIED, and that Defendant's alternative Motion for

Summary Judgement (Docket No. 175) is GRANTED; and it is further

ORDERED that Plaintiff's Partial Motion for Summary Judgment (Docket No. 174) is DENIED.

March 19th 1998

/s/
Thomas F. Hogan
United States District Judge

APPENDIX D

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7075 **September Term, 1999**

92cv02897
95cv00611

Patricia Kidd,
Appellant

v.

District of Columbia, et al.
Appellees

Filed On:

Filed
June 2, 2000

Consolidated with 98-7100

BEFORE: Silberman, Williams and Tatel, Circuit Judges.

ORDER

Upon consideration of appellant's *pro se* petition for rehearing filed April 24, 2000, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Robert A. Bonner
Deputy Clerk

APPENDIX E

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7075 **September Term, 1999**

92cv02897
95cv00611

Patricia Kidd,
Appellant

v.

District of Columbia, et al.
Appellees

Filed On:

Filed
June 2, 2000

Consolidated with 98-7100

BEFORE: Edwards, Chief Judge; Silberman, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel and Garland, Circuit Judges.

ORDER

Upon consideration of appellant's *pro se* petition for rehearing en banc, and the absence of a request by any member of the court for a vote, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s/
Robert A. Bonner
Deputy Clerk

Circuit Judge Rogers did not participate in this matter.

APPENDIX F

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7075

Filed On: June 2, 2000

PATRICIA KIDD,
APPELLANT

V.

DISTRICT OF COLUMBIA, ET AL.,
APPELLEES

Consolidated with
98-7100

BEFORE: EDWARDS, *Chief Judge*; SILBERMAN, WILLIAMS, GINSBURG, SENTELLE, HENDERSON, RANDOLPH, ROGERS, TATEL and GARLAND, *Circuit Judges*.

ORDER

The petition for rehearing *en banc* of *amicus curiae* and the response thereto have been circulated to the full court. The taking of a vote was requested. Thereafter, a majority of the judges of the court in regular active service did not

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Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

vote in favor of the petition. Upon consideration of the foregoing, it is

ORDERED that the petition be denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:

Robert A. Bonner
Deputy Clerk

Chief Judge EDWARDS and Circuit Judges SENTELLE, TATEL and GARLAND would grant the petition.

A statement of *Circuit Judge* TATEL, dissenting from the denial of rehearing *en banc*, joined by *Chief Judge* EDWARDS and *Circuit Judges* SENTELLE and GARLAND, is attached.

Circuit Judge ROGERS did not participate in this matter.

TATEL, *Circuit Judge*, with whom EDWARDS, *Chief Judge*, and SENTELLE and GARLAND, *Circuit Judges*, join, dissenting from the denial of rehearing en banc: In my view, this case raises a "question of exceptional importance" because the panel decision will produce precisely the kind of uncertainty and potential loss of appeal rights that Rule 58 was intended to prevent. I trust, however, that our district court colleagues will recognize that there is no disagreement on the panel that the simplest solution is for them to instruct the Clerk of Court to issue judgments adhering to Model Forms 31 and 32. By doing so, they will provide the certainty Rule 58 demands, prevent accidental loss of appeal rights, and ensure that this court will never again have to address this issue. *See Kidd v. District of Columbia*, 206 F.3d 35, 41 (D.C. Cir. 2000); *id.* at 44 (Tatel, J., dissenting).

APPENDIX G

United States Court Of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 98-7075 **September Term, 1999**

Patricia Kidd,
Appellant

v.

District of Columbia, et al.,
Appellees

MANDATE
Pursuant to Fed. R. App. P. 41(a)
ISSUED: 6.13.00

Consolidated with 98-7100

Appeals from the United States District Court
for the District of Columbia
(No. 92cv02897)
(No. 95cv00611)

Before: SILBERMAN, WILLIAMS and TATEL, *Circuit Judges*.

JUDGMENT

These causes came on to be heard on the record on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration thereof, it is

ORDERED and **ADJUDGED**, by the Court, that these appeals are hereby dismissed, in accordance with the opinion for the Court filed herein this date.

FOR THE COURT:
Mark J. Langer, Clerk
BY: /s/
Robert A. Bonner
Deputy Clerk

Date: March 24, 2000
Opinion for the Court filed by Circuit Judge Williams.
Dissenting opinion filed by Circuit Judge Tatel.

APPENDIX H

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF CIRCUIT

PATRICIA KIDD, PLAINTIFF	)	
v.	)	Civil Action No. 92-2897 (TFH) and 95-0611 (DAR)
DISTRICT OF COLUMBIA, et al. DEFENDANTS.	)	Appeals Docket: _____

NOTICE OF APPEALS

(1) Notice is hereby given this 30th day of April, 1998, that Pat Kidd, pro se, plaintiff in the above case(s), appeals to the United States Court of Appeals for the District of Columbia Circuit from all orders, motions, reports, and memoranda, including those dismissing claims against the District of Columbia, Mayors Kelly and Barry, John Payton, Marty Grossman, Eugene Adams, Warren Cruise, Department of Administrative Services, Raymond Lambert, Bruce Marshall, Barry Campbell, Lorraine Britton, Lorraine Green, William Reddick, Robert King, Timothy Edwards, and those dismissing plaintiff's claims under the Equal Pay Act of 1964 and 42 U.S.C. 1981, 1983 entered to favor the defendants sometime in 1994.

(2) Further, Pat Kidd, pro se, plaintiff appeals to preserve her rights from, denials to/of: protective orders, compel discovery, petitions for injunction and temporary restraining orders, motions for recusals and for equitable reliefs, obstruct cases' progress to include granting ninety-three (93) extensions of times, leave to amend complaints. Also, reversing the clerk's granting plaintiff default and from summary judgment dismissing claims of sex discrimination/

sexual harassment, constructive discharge, failure to accommodate a disability, and retaliation by Judge Robinson, upheld by Judge Hogan for the defendants, March 20, 1998.

(3) On April 28, 1998, Kidd personally obtained a copy of the order of summary judgment and the order dismissing her petition for temporary restraining order and recusal from Mr. Burgess, who identified himself as supervisor for Judge Hogan's law clerk, Ms. White. Kidd's affidavit is attached as exhibit A. Plaintiff found about about the ruling only through a response letter from the American Civil Liberties Union to her request soliciting legal services. The letter advised Kidd of the unfavorable ruling by the trial judge and advised her to seek counsel right away. Copy attached as exhibit B.

RECEIVED
APR 30 3 35 PM '98
U.S. DISTRICT COURT

/s/ 4/30/98
Pat Kidd, pro se
615 Roxboro Place, N.W.
Washington, D.C. 20011

I certify that a copy of the notice of appeal was filed and a copy mailed to Bruce Brennan, 441 4th Street, N.W., Washington, D.C. 20004, 30 April, 1998.

/s/
Pat Kidd, pro se

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF CIRCUIT

PATRICIA KIDD, PLAINTIFF	)	
v.	)	Civil Action No. 92-2897 (TFH) and 95-0611 (DAR)
DISTRICT OF COLUMBIA, et al. DEFENDANTS.	)	Appeals Docket: _____

Points and Authorities

1. Rules 3, 4, 8, etc.

AMERICAN CIVIL LIBERTIES UNION FUND
OF THE NATIONAL CAPITAL AREA
1400 – 20TH STREET, NW, WASHINGTON, DC 20036 / 202 457-0804

April 14, 1998

Ms. Patricia Kidd
P.O. Box 56017
Washington, DC 20011

Dear Ms. Kidd:

We received the materials you left at our office requesting assistance with your case, Kidd v. District of Columbia, in U.S. District Court. We reviewed the materials and we regret that we are not able to offer you legal help.

As you know ACLU exists to preserve and extend the constitutional rights and privileges found mainly in the Bill of Rights—rights such as the freedoms of speech, press, and religion; the right to be treated equally and without illegal discrimination; and the right to be free of abusive police conduct. As we have explained before, because of our slim resources we can take only a few cases each year. Thus we concentrate on "test cases" that raise important and unsettled questions of civil liberties, where our participation can affect a large group if we can establish better principles of law.

Our decision is based on our resources and priorities and is not a reflection of the merits of your claims. The court has recently reviewed the matter thoroughly (Report and Recommendation, dated February 23, 1998) and recommended defendants' motion for summary judgment be granted, so you do need legal advice right away to protect your rights.

We do not have resources to send back your papers. We

will hold them for pickup, or you can send $4.00 postage for their return by mail. If you do not send postage or retrieve the papers by April 30 we will discard them. We regret we can't be more help and we wish you well in your efforts to resolve the situation.

Sincerely,

/ s /

Fritz Mulhauser
Coordinator
Litigation Screening Committee

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF CIRCUIT

Exhibit **B**

PATRICIA KIDD,
PLAINTIFF

v.

DISTRICT OF COLUMBIA, et al.
DEFENDANTS.

Civil Action No. 92-2897 (TFH)
and 95-0611 (DAR)

Appeals Docket: _____

Affidavit of Pat Kidd

(1) I, Pat Kidd, pro se, plaintiff, retrieved from my post office box a letter from the American Civil Liberties Union, Fritz Mulhauser, responding to my solicitation for his organization's legal support. His letter, dated April 14, 1998, advised me that the judge had upheld the magistrate's report and ruled against me in favor of the defendants on summary judgment, Exhibit A. Post office box pickups occur once weekly.

(2) On Friday, April 24, 1998, I telephoned the pro se section. The representative confirmed that Judge Hogan's had issued two orders on March 20, 1998. Monday, April 27, 1998, 1 sent my assistant to obtain my orders from Judge Hogan's law clerk, Ms. White. The clerk was not in and a copy of the order was not available. A copy of the docket was provided. The following day, April 28th, I personally went to obtain my copies. I advised the intake clerk that I had become aware of the ruling from another source and of my concerns that as plaintiff, I had not been contacted nor privileged to a "procedural" call for pickup. That I did not see this as an isolated occurrence as the record so documents. The court clerk looking into the matter had Ms. White's supervisor, Mr. Burgess speak with me. Repeating my con-

cerns and protests. Mr. Burgess attested to Ms. White's efficiency—that nothing of this sort has happened involving her. While I can not direct blame I referenced mishaps documented in the record; so acknowledged that law clerks implemented a procedure to call me for pickup to insure I received or picked up copies at the clerk's desk (outside) of the clerk's door. This too was an an important order; the procedure should have been invoked.

(3) Mr. Burgess showed that copies of the orders were in the files. Copies sent to Carol Gordon, former counsel had been returned. I requested copies from Mr. Burgess whom I asked to assent personal receipt to me this April 28, 1998. Mr. Burgess obliged and will investigate this mishap, Exhibit C.

/s/

Signed Pat Kidd, pro se, (202) 726-1955
615 Roxboro Place, N.W., Wash., D.C. 20011

I /s/ certify that I am a notary of the public in D.C. and that Pat Kidd presented properly identified to sign this document this 30 day of Apr. 1998. My commission expires ___ day of _____, 1998.

My Commission Expires August 15, 1999
Petruzelli Days

(2)
FILED
00-544 AUG 30 2000
OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

PATRICIA KIDD,

Petitioner,

v.

DISTRICT OF COLUMBIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

DANIEL G. JARCHO
Counsel of Record
MICHAEL J. HAUNGS
MCKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioner

23pp

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APPENDIX I

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

PATRICIA KIDD,	Filed August 3, 1994
Plaintiff,	
v.	**Civil Action No. 92-2897**
DISTRICT OF COLUMBIA, et al.,	
Defendants.	

MEMORANDUM OPINION

Pending before the Court are the defendants' motions to dismiss the plaintiff's complaint. For the following reasons, this Court dismisses all counts with the exception of the claims of retaliation under Title VII of the Civil Rights Act of 1964 and constructive discharge, which the Court orders the plaintiff to replead.[1]

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[1] This case was recently reassigned to a newly-appointed judge, Judge Emmet G. Sullivan. However, Judge Sullivan will not be taking office until November of 1994. The Court is mindful of the lengthy delays that have already occurred in this case. In the interests of justice, the Court will exercise its power to act on these pending motions. By acting on these motions at this time, the Court intends to assist the parties in avoiding what would otherwise be another lengthy delay in the progress of this case.

I. BACKGROUND

Plaintiff is a realty specialist with the Department of Administrative Services (DAS). She previously won a jury verdict on October 12, 1990, in the Superior Court of the District of Columbia based upon claims of sexual harassment and intentional infliction of emotional distress. The jury awarded the plaintiff monetary damages, which she has not yet received because the District of Columbia is separately appealing both the verdict and the Superior Court's decision to impose direct liability on the District. In addition, the plaintiff has various matters pending before several administrative agencies including a Workman's Compensation claim for injuries arising out of the past harassment and an appeal to the Superior Court of an adverse Office of Employee Appeals (OEA) finding.

Prior to this action (but subsequent to her initial Superior Court case), the plaintiff filed a Title VII charge of retaliation and gender discrimination with the EEOC. After reviewing the charges, the EEOC determined that the plaintiff had not been discriminated or retaliated against in any way. Its decision included a statement concluding all proceedings before the EEOC and giving the plaintiff the right to sue over Title VII matters in federal court within 90 days. Plaintiff's Complaint Ex. A.

The plaintiff then filed this action. The plaintiff expanded her allegations beyond her Title VII claims, adding claims against the District of Columbia, three lawyers involved in the initial suit, and the head of the OEA. Viewed in the light most favorable to the plaintiff, the complaint alleges that the plaintiff was the victim of retaliatory activities after the conclusion of her Superior Court case. The plaintiff, despite the Superior Court's recommendation that she be transferred to a less hostile environment, was returned

to the DAS. Once there, she was placed in a working environment filed with individuals who had full knowledge of the events that had led to her previous complaint. The plaintiff contends that these individuals, in response to her initial trial, committed a series of retaliatory gestures against her including setting purposely unreasonable deadlines, denying supervisory assistance, and preventing her from attending meetings concerning her work. The plaintiff further claims that as a result of this behavior she was forced to leave her job. Plaintiff's Complaint at 16-18.

The plaintiff initially sought the appointment of counsel and subsequently filed a motion for a temporary restraining order and a preliminary injunction with the late Judge Revercomb. In response, the defendants filed a motion to dismiss and opposed the motion for a temporary restraining order. The Court made several attempts to appoint counsel in accordance with Local Rule 702.1(a)(5)(A), but all of these attempts failed. On two separate occasions, pro bono counsel withdrew shortly after being appointed to represent the plaintiff. All subsequent efforts at locating counsel have similarly failed.

After Judge Revercomb's death, the case was reassigned to this Court. The plaintiff then filed a motion to amend her complaint to include a claim of "involuntary resignation through constructive firing." Subsequently, the plaintiff filed a second motion asking the Court to grant her previous motions for a temporary restraining order and preliminary injunction and to bar the defendant from any further opportunity to respond on the record. The plaintiff then filed a third motion asking the Court to strike the defendants' motion to dismiss and to enter a default judgment in her favor. Subsequently, the Court issued an order on October 4, 1993, lifting any stay that may have existed and ordering all parties to respond to any outstanding motions within 14 days.

It was further ordered that, unless counsel could be found, the plaintiff should proceed in the matter pro se.

Complying with this Court's Order, the plaintiff filed a response to defendants' original motion to dismiss. The defendants then filed motions opposing the plaintiff's attempt to amend the complaint, and opposing the plaintiff's motion to strike and to enter default. The defendants also filed a supplemental motion to dismiss, which prompted the plaintiff to file an additional motion to strike.

During this last series of motions, the plaintiff also sought the re-appointment of counsel, indicating that she had located an attorney willing to represent her. While the Court was in the process of attempting to appoint this attorney, the plaintiff filed a pro se motion for immediate and equitable relief. The defendant then filed a response to that motion. After this latest attempt to appoint counsel also proved fruitless, the Court required the plaintiff to proceed pro se.

On February 2, 1994, the Court issued a Memorandum Opinion denying the plaintiff's motion for immediate and equitable relief as well as the plaintiff's motion to deny the defendants further opportunity to respond to the record. The Court allowed the plaintiff to amend her complaint to include a claim of constructive discharge. The plaintiff then filed an opposition to the defendants' supplemental motion to dismiss, to which the defendants have replied.

II. DISCUSSION

Because the defendant has filed a Fed. R. Civ. P. 12(b)(6) motion, the Court accepts the plaintiff's allegations of facts in the complaint and other documents as true. Whitacre v. Davey, 890 F.2d 1168, 1168 n.1 (D.C. Cir. 1989), cert denied, 497 U.S. 1038 (1990). Furthermore, the Court has the duty in pro se to hold the plaintiff's filings to a less stringent standard than formal pleadings drafted by lawyers. The Court can dismiss a pro se pleading only when it is "beyond

doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Haines v. Kerner, 404 U.S. 519, 520-21 (1972) (quoting Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). The Court will examine each of the plaintiff's various allegations to determine whether she has stated a valid claim against any of the defendants.

A. OCC Defendants

In her complaint, the plaintiff sues three attorneys at the District's Office of Corporation Counsel (OCC Defendants): Corporation Counsel John Payton,[2] Civil Division Deputy Corporation Counsel Martin L. Grossman, and Eugene Adams (the attorney who represented the defendants in the plaintiff's Superior Court trial). The plaintiff seems to claim that these attorneys were in the role of superiors to her fellow employees and therefore had the obligation, which they neglected, to inform and train fellow employees not to retaliate against her for past suits. In analyzing the plaintiff's argument, the Court will accept this as true, although it is highly unlikely that these lawyers can be shown to have had supervisory duties.

The plaintiff is correct in asserting that there are limited situations where a supervisor may be held responsible for the actions of the employees working below them. In order to state such a claim against a supervisor, it must be shown that absent effective supervision, harm was not merely foreseeable to the supervisor but was highly likely. Haynesworth v. Miller, 820 F.2d 1245, 1261-62 (D.C. Cir. 1987).

The plaintiff completely fails to indicate why these attorneys should have foreseen any alleged unconstitutional or

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[2] The court notes that John Payton is no longer Corporation Counsel. Vanessa Ruiz is the current Corporation Counsel.

illegal actions by the DAS. The plaintiff also fails to suggest that they had the authority or duty to stop such activities. She fails to give any indication of what supervisory role the lawyers should have played or how harm could have been avoided by the lawyers. Therefore, all claims against the OCC defendants are dismissed under Fed. R. Civ. P. 12(b)(6) for failure to state a claim upon which relief can be granted.

B. Warren Cruise, Director OEA

The plaintiff also sues the Director of OEA, Warren Cruise. Despite a reference to this defendant in the initial pages of the complaint, the plaintiff makes no allegations that Cruise committed any specific acts of harassment, discrimination or retaliation. Furthermore, the plaintiff has pointed to no policies or procedures of the agency Cruise directs which are connected to the allegations. Therefore, the charges against Cruise are dismissed for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6).

C. District of Columbia

The plaintiff also sues the District of Columbia by naming Mayor Sharon Pratt Kelly as defendant in her claims under 42 U.S.C. § 1981, § 1983 and § 1985.[3] The Supreme Court has stated that a municipality can be sued only where the "action that is alleged to be unconstitutional implements

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[3] While a complaint must normally name the District as a defendant if funds are to be reached, "[w]hen the realities demonstrate that the District is an intended defendant, its omission as a formal matter is [not] fatal to plaintiff's suit." Parker v. District of Columbia, 588 F. Supp. 518, 522 (D.D.C. 1983) (citing Keith v. Washington, 401 A.2d 468, 471 (D.C. 1979)). It seems clear and it is conceded by both parties that the intention in the naming of the Mayor was to sue the District. Defendants' Supplemental Motion to Dismiss at 14; Plaintiff's Opposition to Defendants' Motion to Dismiss at 5. Therefore, the Court will proceed as though the District had been formally named.

or executes a policy statement, ordinance, regulation, or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy." Monell v. Department of Social Servs., 436 U.S. 658, 690-91 (1978).

In her claim, the plaintiff is unable to satisfy the "Official Policy" requirement of Monell. Although it may be true that there are deficiencies in the District's current policies towards sexual harassment (as was shown in the first trial), the plaintiff has not alleged any facts to suggest the existence of a policy connected to the allegedly retaliatory events occurring after the Superior Court Trial. Therefore, the plaintiff's claim against the District are dismissed for failure to state a claim. Fed. R. Civ. P. 12(b)(6).[4]

D. Equal Pay Act of 1964

The plaintiff further alleges that the defendants violated the Equal Pay Act of 1964, 29 U.S.C. § 206(d), in regard to her salary. In order to establish a violation of the act, it must be shown that an employer pays different wages to employees "for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions." Brennan v. Corning Glass Works, 417 U.S. 188, 195 (1974). Beyond the plaintiff's bare assertions, she has made no specific alle-

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[4] This Court has previously dismissed an action against the District because "in order for the District of Columbia to be liable, plaintiff is at least required to plead facts sufficient to support the inference that the officers were acting pursuant to some policy of the District." Graham v. District of Columbia, 795 F.Supp. 24, 26. (D.D.C. 1992); see Hunter v. District of Columbia, 943 F.2d 69, 74 (D.C. Cir. 1991) ("The dismissal of Hunter's claim against the District of Columbia was warranted because he alleged neither a municipal policy . . . nor any action by a District policy maker amounting to deliberate indifference").

gations to indicate that she was paid a lesser wage in comparison to other workers performing the same duties. Because the plaintiff does not in any way indicate that there was wage discrimination, this allegation must be dismissed for failure to state a claim. Fed. R. Civ. P. 12(b)(6).

E. DAS Defendants

The plaintiff alleges that the DAS defendants violated 42 U.S.C. § 1981, § 1983 and § 1985. The plaintiff further claims that the DAS defendants retaliated against her for her past Title VII activities and claims that she was constructively fired from her job.

1. § 1981, § 1983 and § 1985 Claims

The Plaintiffs fails to state a § 1981 claim because she does not allege any disparate treatment on her return to work which was based on either racial discrimination or, more importantly, that the treatment dealt with the formation of her contract. The Supreme Court has stated that § 1981 is restricted in scope to forbidding racial discrimination only in the "mak[ing] and enforce[ment] of contracts." Patterson v. Mclean Credit Union, 491 U.S. 164, 176-178 (1989).

The facts of this case are similar to those in Patterson in that, with the possible exception of the plaintiff's claim that the defendants refused to promote her, none of the conduct that she alleges—that she was not afforded training for higher level jobs, was singled out for criticism, or was retaliated against for her past complaints—involves either the refusal to make a contract with her or her ability to enforce established contract rights. Instead, the allegations against the defendants are related to post formation conduct.

As to her claim for failure to promote, the plaintiff has not supplied any allegations that she was denied advancement on the basis of racial discrimination. The wording of § 1981 clearly states that its purpose is to guarantee "the same right...to...enforce contracts...as is enjoyed by white citi-

zens." By not offering any specific claims that the plaintiff was denied promotion on the basis of her racial characteristic, the plaintiff fails to state an adequate claim under Fed R. Civ P. 12(b)(6).

Similarly, a § 1985 claim relies on discrimination against individuals based on their being part of a larger acknowledged protected group. The Supreme Court has stated "[t]he language requiring intent to deprive of equal protection, or equal privileges and immunities, means there must be some racial, or perhaps otherwise class based, invidiously discriminatory animus behind the conspirators' actions." Griffin v. Breckenridge, 403 U.S. 88, 102 (1971). The plaintiff, however, does not allege any facts suggesting this type of class based discrimination or racial motives in her assertions. For this reason the plaintiff fails in her § 1985 pleading. The claim is dismissed under Fed. R. Civ. P. 12(b)(6).

The plaintiff's 42 U.S.C. § 1983 claim also fails to meet pleading requirements. The Supreme Court has stated that in order to state a claim under § 1983 a plaintiff must allege that an individual acting under color of state law violated a right protected by the Constitution and laws of the United States. West v. Atkins, 487 U.S. 42, 48 (1988). However, nowhere in either the complaint or the other various submitted documents does the plaintiff indicate what or how her Constitutional or statutory rights were infringed by the defendants.[5] This fails to meet even the most liberal plead-

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[5] The plaintiff does mention the Fifth and Fourteenth Amendments in her Memorandum of Points and Authorities in Opposition to Defendants Motion to Dismiss. However, beyond citing these amendments, their applicability is never explained thoroughly enough to meet even the most lenient pleading standards.

ing standards and, therefore, these claims must also be dismissed. Fed. R. Civ. P. 12(b)(6).

2. Title VII Claims

The plaintiff also alleges that the DAS defendants violated Title VII of the Civil Rights Act of 1964. Although the plaintiff's allegations in her complaint are sketchy, she appears to assert that her rights were violated under 42 U.S.C. § 2000e-3 (section 704 A) and that she maintains her right to a private cause of action under 42 U.S.C. § 2000e-5. However, the plaintiff's complaint is very unclear about the extent of the retaliation and the individuals directly responsible for many of the actions.

Although this lack of specificity may have caused a dismissal of a complaint filed by an attorney, "[p]ro se litigants are allowed more latitude than litigants represented by counsel to correct defects in service of process and pleading." Moore v. Agency for International Development, 994 F.2d 874, 876 (D.C. Cir. 1993). The United States Court of Appeals for the District of Columbia Circuit recently explained that there are some circumstances where a pro se plaintiff should be allowed to replead a complaint. In Moore, the plaintiff failed to make any specific allegations against the defendants that would satisfy the applicable heightened pleading standard. 994 F.2d at 877-878. Nevertheless, the court indicated that the district court should have informed the plaintiff of the defects in his complaint and permitted him to file an amended complaint. Id. After examining the complaint and the entire record in this case, the Court finds that, although the complaint is insufficient at the present time, there is reason to believe that the plaintiff

could produce a cognizable Title VII claim.[6] Therefore, in keeping with the spirit Moore, the Court will allow the plaintiff to replead her Title VII allegations.

Moore also discusses the "importance of providing pro se litigants with the necessary knowledge to participate effectively in the trial process." Id. In order to attempt to comply with this principle, the Court will now examine the current state of the plaintiff's complaint and try to indicate its deficiencies.

Section 704(a) of Title VII makes it illegal "to discriminate against any individual... because he has made a charge, testified, assisted or participated in an investigation, proceeding, or hearing under this subsection." 42 U.S.C. § 2000e-3, 1964. In order to establish a prima facie case under section 704(a), a plaintiff must show: 1) that he or she engaged in activity protected by the statute; 2) that the employer engaged in conduct having an adverse impact on the plaintiff; and 3) that the adverse action was casually related to the plaintiff's exercise of protected rights. Berger v. Iron Workers Reinforced Rodmen Local 201, 843 F.2d 1395 (D.C. Cir.), clarified on reh'g, 852 F.2d 619 (D.C. Cir. 1988), cert. denied, 490 U.S. 1105 (1989).

In order to meet these requirements, the plaintiff needs to more specifically explain what retaliatory acts were committed against her upon her return to the DAS. The plaintiff must also specifically indicate who committed these acts. Simply put, the plaintiff must move beyond general statements and provide the Court with specific factual allegations about the people and events that gave rise to these

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[6] Of particular influence in the Court's decision is a comparison between the submitted complaint and a chronology provided by the plaintiff.

charges. Although it is unclear whether the plaintiff will be able to state a valid claim, the Court orders the plaintiff to replead this claim setting forth with more specificity the precise actions that form the basis for her Title VII claim. Accordingly, the defendants' motion to dismiss the Title VII claim is denied without prejudice.

3. Constructive Discharge

The plaintiff's constructive discharge claim presents the Court with similar concerns. The complaint indicates that there may be enough evidence to sustain a claim. However, the complaint is so unclear and provides so few specifics that the Court is unable to determine whether the plaintiff can state a valid claim. Therefore, the Court orders the plaintiff replead this claim.

In order to find constructive discharge in conjunction with a discrimination claim, a court must find not only intentional discrimination, but also "aggravating factors." Dashnaw v. Pena, 12 F.3d 1112, 1115 (D.C. Cir 1994) (quoting Clark v. Marsh, 665 F.2d 1168, 1174 (D.C. Cir 1981)).[7] The D.C. Circuit has permitted a constructive discharge claim in conjunction with a Title VII claim on the basis of "a continuous pattern of discriminatory treatment encompassing deprivation of opportunities for promotion, lateral transfer, and increased educational training." Clark, 665 F.2d at 1175. A thorough review of the record suggests that the plaintiff may be able to properly allege such aggra-

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[7] Although there is no set definition of these "aggravating factors," the D.C. Circuit established general criteria in Clark. There, the court held that a "finding of constructive discharge depends on [whether the employer] deliberately made... working conditions intolerable and drove [the employee] into an involuntary quit." Clark, 665 F.2d at 1173 (quoting Retail Store Employees Union v. NLRB, 419 F.2d 329, 332 (D.C. Cir. 1968)).

vating factors. However, due to the lack of specifics in the complaint, the plaintiff has not sustained the burden needed to bring a constructive discharge claim in conjunction with a Title VII action. The plaintiff's claim must move beyond simple allegations to a higher level of specificity before it can pass even the most lenient pleading standards. Therefore, in the spirit of Moore, the Court orders the plaintiff to replead here constructive discharge claim. The defendants' motion to dismiss the constructive discharge claim is denied without prejudice.

III. CONCLUSION

In its attempt to comply with the holding of Moore, this Court will deny the defendants' motion to dismiss the plaintiff's Title VII and constructive discharge claims. The Court further orders the plaintiff to replead these claims with greater specificity by September 1, 1994. However, the Court finds that the plaintiff's other claims are so clearly meritless that they can be dismissed for failure to state a claim under Fed R. Civ. P. 12(6)(b).

/s/

August 3rd, 1994

Thomas F. Hogan
United States District Judge

APPENDIX J

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

PATRICIA KIDD, **Plaintiff,** **vs.** **DISTRICT OF COLUMBIA, et al.,** **Defendants.**	Filed February 23, 1998 **Civil Action Nos. 92-2897 & 95-0611 (CONSOLIDATED) TFH/DAR**

REPORT AND RECOMMENDATION

Pending for consideration by the undersigned United States Magistrate Judge are (1) Plaintiff's Partial Motion for Summary Judgment (Docket No. 174), and (2) Defendants' Motion to Dismiss or in the Alternative for Summary Judgment (Docket No. 175). Plaintiff is a former employee of the District of Columbia Department of Administrative Services. In October, 1990, following a jury trial in the Superior Court of the District of Columbia, plaintiff was awarded money damages and other relief with respect to her claims or sexual harassment and intentional infliction of emotional distress by two District of Columbia managers. Plaintiff also brought administrative claims, including a worker's compensation claim and an appeal of an adverse decision by the Office of Employee Appeals. See August 3, 1994 Memorandum Opinion (Hogan, J.) at 1-2. The underlying judgment, fees and interest, totaling in excess of $348,000, have since been paid, and the administrative claims have been dismissed by the Superior Court on procedural grounds. See Memoran-

dum of Points and Authorities in Support of Defendants' Motion to Dismiss or in the Alternative for Summary Judgement ("Defendants' Memorandum") at 2.

In the first of these consolidated actions, commenced prior to the payment by the District of Columbia of the judgment, interest and fees in the Superior Court case, plaintiff complained of discrimination, retaliation and constructive discharge in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq.; violation of her rights under the Equal Pay Act of 1964, 29 U.S.C. § 206(d); and violation of her rights under 42 U.S.C. §§ 1981, 1983 and 1985. The court (Hogan, J.) dismissed all of these claims with the exception of the Title VII claims of retaliation and constructive discharge. August 3, 1994 Order; see August 3, 1994 Memorandum Opinion at 14. Plaintiff thereafter filed the second of these consolidated actions, in which she alleged failure to accommodate a mental handicap in violation of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791 et seq.

As directed by the scheduling orders of the undersigned, both plaintiff and defendants filed dispositive motions. Plaintiff moves for summary judgment in her favor.[1]

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[1] Plaintiff's submission is captioned "Memorandum in Support of Plaintiff's Partial Motion for Summary Judgment." The submission is not accompanied by a separate motion. While plaintiff characterizes the relief which she seeks as summary judgment, she attempts to demonstrate that she can establish "a prima facie case of retaliation discrimination" and "a prima facie case of disability discrimination" under the Rehabilitation Act, thereby suggesting that she intends the memorandum to be, at least in part, an opposition to defendants' motion to dismiss or for summary judgment. See Memorandum in Support of Plaintiff's Partial Motion for Summary Judgment ("Plaintiff's Memorandum") at 12-15. Plaintiff's memorandum includes a seven page, 47 paragraph section captioned "Statement of Material Facts Not in Dispute," but no separate statement required by

(Footnote cont'd on next page)

Defendants move for dismissal pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim upon which relief can be granted or, in the alternative, for summary judgment in their favor.

Upon consideration of these motions, the memoranda of points and authorities in support thereof and the entire record herein, the undersigned will recommend that defendants' motion be granted, and that plaintiff's motion be denied.[2]

DISCUSSION

I. Applicable Standards

In evaluating a motion to dismiss, whether on the ground of lack of subject matter jurisdiction or for failure to state a claim upon which relief can be granted, all well-pleaded factual allegations of the complaint are to be construed in the light most favorable to the plaintiff. Schemer v. Rhodes, 416 U.S. 232, 236 (1974); see Fernando v. Rush-Presbyterian-St. Luke's Medical Center, 882 F. S.p. 119, 121 (N.D. Ill. 1995). Additionally, the court must accept as true all reasonable inferences to be drawn from the well-pleaded factual allegations. See, e.g.., Fernando v. Rush-Presbyterian-St. Luke's Medical Center, 882 F. Spp.. at 121.

(Footnote cont'd from previous page.)

Local Rule 108(h). See Supplemental Order entered May 15, 1996. Plaintiff's use of the word "partial" in the caption of her memorandum appears to constitute a request that she be allowed to supplement her memorandum following any appeal. See Plaintiff's Memorandum at l.

[2] Consistent with this recommendation, the undersigned, by a separate Order entered this date, determines three pending non-dispositive motions.

In determining a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim that would entitle him to relief." Coney v. Gibson, 355 U.S. 41, 45-46 (1957); see Shear v. National Rifle Association, 606 F.2d 1251, 1253 (D.C. Cir. 1979). However, Rule 12(b) of the Federal Rules of Civil Procedure provides that if matters outside the pleading are presented and not excluded by the court, a motion to dismiss for failure to state a claim upon which relief can be granted shall be treated as a motion for summary judgment and decided in accordance with Rule 56.

Federal Rule of Civil Procedure 56(c) provides that summary judgment shall be granted in favor of a moving party if the record indicates that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. FED. R. CIV. P. 56(c). To avoid summary judgment, the non-moving party must demonstrate that a genuine dispute exists, and provide evidence sufficient for a jury to return a verdict for that party. Anderson v. Liberty Lobby Inc., 477 U.S. 242, 248 (1986); see Cheilitis Corp. v. Citrate, 477 U.S. 317, 322-23 (1986). The non-moving party may not rely upon the mere allegations or denials in its pleadings as support for its position, but rather must establish specific facts through affidavits based upon personal knowledge. See FED. R. CIV. P. 56(e).

Affidavits submitted with an opposition to a motion for summary judgment must satisfy the requirements of Rule 56 of the Federal Rules of Civil Procedure, which provides, in pertinent part, that

> [supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to

> the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by deposition, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

FED. R. CIV. P. 56(e) (emphasis added).

Additionally, Local Rule 108(h) mandates that each motion for summary judgment be accompanied by a statement of material facts as to which there is no genuine issue. This statement must be supported by references to the record. The motion must also be accompanied by a statement of points and authorities supported by specific points of law. The same rule requires that an opposition to a motion for summary judgment be accompanied by a

> separate concise statement of genuine issues setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated, which shall include references to the parts of the record relied on to support the statement . . . In determining a motion for summary judgment, the Court may assume that facts identified by the moving party in its statement of material facts are admitted, unless such a fact is controverted in the statement of genuine issues filed in opposition to the motion.

Local Rule 108(h).

II. Findings

As the parties have presented, and the undersigned has not excluded, matters outside the pleadings, the undersigned will recommend that defendants' motion to dismiss be denied, and that both plaintiff's motion and defendants' motion be treated as motions for summary judgment. The undersigned finds that defendants have complied with the requirements of Rule 56(c) and (e) of the Federal Rule of Civil Procedure and Local Rule 108(h), but that plaintiff has not complied with these provisions in either her motion for summary judgment or her opposition to complied with these provisions in either her motion for summary judgment or her opposition to defendants' motion for summary judgment.[3] The undersigned further finds that defendants have demonstrated that there is no genuine issue as to any material fact and that they are entitled to judgment as a matter of law with respect to plaintiff's remaining claims.

More specifically, the undersigned finds that the pleadings, affidavits and other sworn testimony and the entire record show that there is no genuine issue as to any material fact concerning plaintiff's (1) non-promotion; (2) training opportunities; (3) reduced duties; (4) performance evaluations; (5) return to the agency for which she formerly worked; and (6) rights under the Rehabilitation Act. Defendants' Memorandum at 10-41. Moreover, the undersigned finds that plaintiff has failed to identify even a single material fact as to which a genuine issue for trial exists. Defendants' Opposition and Reply at 3-16. Rather, both her motion and her opposition to defendants' motion are almost

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[3] See Defendants' Opposition to Plaintiff's Motion for Summary Judgment and Reply to Plaintiff's Opposition to Defendants' Motion for Summary Judgment (Docket Nos. 181 and 182 ("Defendants' Opposition and Reply") at 2; see also n. 1, supra.

entirely comprised of her opinions of defendants' actions and characterizations of various statutes and decisions.[4]

Finally, on the basis of the foregoing findings, and upon consideration of the applicable authorities, the undersigned further finds that defendants are entitled to judgment as a matter of law.[5]

CONCLUSION

Upon consideration of Plaintiff's Partial Motion for Summary Judgment, Defendants' Motion to Dismiss or, in the Alternative for Summary Judgment, the memoranda in support of and in opposition thereto, and the entire record herein, it is, this 23rd day of February, 1998,

RECOMMENDED that Defendants' Motion to Dismiss be denied, and that their alternative Motion for Summary Judgment (Docket No. 175) be **GRANTED**; and it is

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[4] See, e.g., Plaintiff's Motion (Amended) Response to Defendants' Motion to Dismiss or in the Alternative, Summary Judgment (Docket No. 178) ("Plaintiff's Opposition"), ¶¶ 20, 21, 28, 36-38, 41-46. Plaintiff did not provide with her opposition the separate statement of facts as to which a genuine issue exists, as required by Local Rule 108(h).

[5] The elements of a prima facie case of retaliation and failure to accommodate are settled, well-known to the parties and indeed, not subject to dispute in these consolidated actions. See August 3, 1994 Memorandum Opinion at 11-14; Defendants' Memorandum at 8, 25, 32; Plaintiff's Opposition, ¶ 20, 26-27. Accordingly, these authorities will not be discussed in greater detail herein.

FURTHER RECOMMENDED that Plaintiff's Partial Motion for Summary Judgment (Docket No. 174) be **DENIED**.

/s/

DEBORAH A. ROBINSON
United State Magistrate Judge

Within ten days after being served with a copy, any party may file written objections to this report and recommendation. The objections shall specifically identify the portions of the proposed findings and recommendations to which objection is made and the basis for the objection. In the absence of timely objections, further review of issues decided by this report and recommendation may be waived.

Supreme Court, U.S.
FILED
NOV 29 2000
CLERK

(3)

No. 00-544

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICIA KIDD,

Petitioner,

v.

DISTRICT OF COLUMBIA, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF IN OPPOSITION

ROBERT R. RIGSBY,
Corporation Counsel
CHARLES L. REISCHEL,
Deputy Corporation Counsel
LUTZ ALEXANDER PRAGER
Assistant Deputy Corporation Counsel
*JAMES C. MCKAY, JR.,
Senior Assistant Corporation Counsel
Office of the Corporation Counsel, D.C.
441 Fourth Street, N.W., 6th floor South
Washington, D.C. 20001-2714
Telephone: (202) 724-5690
**Counsel of Record*

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REASONS FOR DENYING THE PETITION

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No. 00-544

IN THE

SUPREME COURT OF THE UNITED STATES

PATRICIA KIDD,
Petitioner,
v.
DISTRICT OF COLUMBIA, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit, *Kidd v. District of Columbia*, Pet.App. 1a-21a,[1] is reported at 206 F.3d 36 (D.C. Cir. 2000).

COUNTER-STATEMENT OF THE CASE

The petition requires us to provide a fuller picture of the facts.

1. Background

Petitioner, Patricia Kidd, is a former District Government employee, who worked in the D.C. Department of Administrative Services (DAS). She filed a suit for sexual harassment and

[1] "Pet.App." refers to the appendix to the petition.

intentional infliction of emotional distress against her former supervisor, Melvin Carter; his supervisor, Robert King; the Director of DAS, Raymond Lambert; and the District of Columbia, based on events in 1987 and 1988, during the administration of Mayor Marion Barry. After the trial court directed a verdict in favor of Lambert and the District on the sexual harassment claim, a jury found Carter liable under both the sexual harassment and the emotional distress claims; found appellants Lambert and King liable under the emotional distress claim; found in favor of the District on the emotional distress claim; and found in favor of King on the sexual harassment claim. The District of Columbia Court of Appeals reversed the verdict against Lambert. See *King v. Kidd*, 640 A.2d 656, 658-659 (D.C. 1993).

In October, 1990, after the trial, Kidd returned to work for DAS under the supervision of Jeannette Wills. Affidavit of Jeannette Wills, D.C.Cir.App. 358.[2] In January 1991, Sharon Pratt Kelly became the Mayor of the District, and Ric Murphy replaced Lambert as DAS Director. *Id.*

Immediately upon her return, Kidd, who had been ordered promoted retroactively to a DS-11 by the court, requested immediate promotion to a DS-12. *Id.* at 359. However, the Mayor had imposed a freeze on promotions and filling vacancies for all District employees. *Id.* Moreover, Wills explained to Kidd that promotion was not automatic under the personnel regulations, even in the absence of a freeze, and, in any case, she did not think that Kidd's performance deserved promotion yet. She would, however,

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[2]"D.C.Cir.App." refers to the Appendix of the case in the D.C. Circuit filed by *amicus curiae* who was appointed by that Court to file a brief in support of Kidd's position and is now representing Kidd before this Court.

work with Kidd to give her the necessary experience and assignments for promotion. *Id.* 359-360. Kidd also sought promotion by applying to what she thought were vacancies cased by the resignation of other staff; however, these positions were not advertised or filled. *Id.* 359.

Wills stated that Kidd did not need to interact with Carter, her former supervisor, as he was on another floor, the basement. He soon left the District Government. *Id.* 360-361. King, although in the chain of command, distanced himself from matters involving Kidd and eventually left the District Government. *Id.*[3]

In November, 1990, Lambert, the new DAS Director, announced a reorganization of DAS. The duties of all employees of the division to which Kidd was assigned were affected. Some employees at a higher level than Kidd were given responsibilities below their grade levels. *Id.* 361-362; Affidavit of Lorraine Britton, DAS Deputy Director, *id.* 403. Kidd also requested training opportunities, but DAS's tight budget situation resulted in the denial of many training requests. Wills Affidavit, *id.* 363.

Kidd was absent for several extended periods, and, although she had no sick leave, was given 180 hours of advanced sick leave

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[3]The statement in Kidd's petition that "[w]hen she returned to work immediately after the trial, she was placed back under the supervision of the very same individuals who had just been found personally liable to her," Pet. 8, is misleading since it omits the critical fact that Kidd's immediate supervisor, and the only person with whom Kidd had daily contact, was Jeanette Wills–a person who had absolutely no involvement with Kidd's previous claims. The passage from the D.C. Circuit decision cited is much more qualified. Pet.App. 3a.

in 1991. *Id.* 364. Wills consistently gave Kidd performance evaluations of "excellent." *Id.* 365.

After Kidd requested to work in a position outside of DAS, DAS Director Murphy arranged for transfer. Britton Affidavit, *id.* 405. However, when Kidd was given the opportunity to apply for a DS-12 position as a contract specialist in the D.C. Department of Human Services (DHS), she frustrated the process by failing to submit writing samples requested as part of the application. Affidavit of Patricia Watts, *id.* 350.

DAS Director Murphy then requested, and received, a waiver from the freeze on personnel movement from the City Administrator to permit Kidd to be reassigned to the D.C. Department of Assisted Housing (DPAH), and detailed her there immediately. Britton Affidavit, *id.* 406. However, Kidd returned to DAS at the end of her detail in August, 1992. *Id.* 407. Nevertheless, Kidd abruptly left work on September 1, 1992, and never returned. *Id.*

On September 4, 1992, Kidd reported that she was on medical leave, and again was given advance sick leave, although she still owed 111 hours of leave. *Id.* When she did not return or provide medical documentation for her absence, she was put on AWOL. She submitted a letter of resignation in July 1993. *Id.*

2. EEOC Determination Letter Rejecting Kidd's Charges

Before Kidd filed suit, she filed charges with the United States Equal Employment Opportunity Commission (EEOC) under Title VII of the Civil Rights Act of 1964 and the Equal Pay Act. EEOC found the charges unsupported:

> There is no evidence to indicate that Respondent has retaliated against Charging Party because she filed a previous charge by denying her a promotion to DS-12, or that she was paid less than similarly

> situated males, harassed and intimidated, and denied a reassignment. The record shows that she has received the same treatment and salary as similarly situated employees.

EEOC Determination Letter of September 22, 1992, D.C.Cir.App. 73.

3. Kidd's Complaint and the District Court's Dismissal of the Bulk of Her Claims.

On December 30, 1992, Kidd filed a complaint against the District of Columbia and various officers and employees alleging the same violations. *See* Complaint, D.C.Cir.App. 48. Although technically *pro se*, Kidd was represented by six lawyers during her litigation in the district court.[4] The court attempted on several occasions to appoint pro bono counsel but, but they all withdrew, and finally the court ordered her to proceed *pro se*. Pet.App. 3a.

On October 5, 1993, the district court entered an order advising Kidd of her obligations under the Federal Rules of Civil Procedure and rules of the district court, specifically, Fed.R.Civ.P. 6(e), 12(b), 56(c), and 56(e) and Local Rules 108(b) and 108(h), which were set forth in full. D.C.Cir.Supp.App. 1-4[5]. With respect to Local Rule 108(h), she was advised that "[t]he Court will

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[4]Carla M. Macklin, Esq., of Dickstein Shapiro Morin & Oshinsky, LLP, D.C.Cir.App.1; Roger C. Johnson, Esq., of Koonz, McKenney, *id.*; Carol M. Gordon, Esq., *id.* 262; Gwendolyn Ray Bennett, Esq., *id.* 13; Rogers C. Johns, Esq., *id.* 7; Thomas C. Papson, Esq., *id.* *See also*, Pet.App. 42a.

[5]"D.C.Cir.Supp.App." refers to the Supplemental Appendix of Appellees (defendants) filed in the D.C. Circuit.

accept as true any factual assertions contained in affidavits or attachments submitted by the defendant in support of its motion to dismiss unless the plaintiff submits its own affidavits or documentary evidence showing that the defendant's assertions are untrue." *Id.* 3.

On August 3, 1994, the district court issued a Memorandum Opinion, granting the bulk of defendants' motion to dismiss for failure to state a claim upon which relief could be granted, including Kidd's claims against the Mayor, the Director of the D.C. Office of Employee Appeals, the D.C. Corporation Counsel, and several members of his office. The court also dismissed Kidd's claim under the Equal Pay Act of 1964, 29 U.S.C. § 206(d), because "she has made no specific allegations to indicate that she was paid a lesser wage in comparison to other workers performing the same duties." Pet.App. 45a. Finally, the court dismissed Kidd's claims under 42 U.S.C. §§ 1981, 1983, and 1985, holding that she "has not supplied any allegations that she was denied advancement on the basis of racial discrimination"; she failed to indicate "what or how her Constitutional or statutory rights were infringed by the defendants"; and she "does not allege any facts suggesting a class based discrimination or racial motives." Pet.App. 46a-47a.

The court denied, without prejudice, defendants' motion to dismiss Kidd's claims of retaliation and constructive discharge under Title VII of the Civil Rights Act, explaining that, although she had not established a *prima facie* case of retaliation and constructive discharge, she might be able to do so if she were allowed to replead her case. The court noted that, to meet these requirements, she needed to explain specifically what retaliatory acts were committed against her and who committed these acts, rather than making general statements. Pet.App. 49a-51a.

4. Motions for Summary Judgment

Kidd filed an amended complaint repleading the remaining counts as well as a new complaint based on § 704 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, and the court consolidated the actions and referred them to a magistrate judge for a report and recommendation. Among the orders issued by the magistrate judge was an order, filed May 15, 1996, similar to the district court's order of October 5, 1993, advising Kidd of her obligations under the Federal Rules of Civil Procedure and Local Rule 108(h). D.C.Cir.Supp.App. 31-34.

On February 6, 1997, defendants filed a motion to dismiss or, in the alternative, for summary judgment, *id.* 35, which was accompanied by a Statement of Material Facts Not in Dispute, supported by affidavits and other documents. D.C.Cir.App. 343-344.[6] Kidd filed a motion for partial summary judgment. *Id.* 285.

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[6]Defendants also argued that they were entitled to judgment because Kidd had failed to file suit within 90 days of receiving the right-to-sue letter from the EEOC. D.C.Cir.App. 302-303. *See* 42 U.S.C. § 2000e-5(f)(1); *Smith-Haynie v. District of Columbia*, 155 F.3d 575, 577 (D.C. Cir. 1998) (suit filed 92 days after receipt of right-to-sue letter barred as untimely). The EEOC letter was dated September 22, 1992, D.C.Cir.App. 74, but she did not file suit until December 30, 1992, *id.* 48--98 days later. Kidd attached a certified envelope from EEOC, dated October 29, 1994--37 days after the date of the letter--and implied that the letter was contained in that envelope. *Id. 76.* However, defendants argued that the envelope was not the one that accompanied the right-to-sue letter, and Kidd did not respond to this argument. *Id.* 303 n.2.

5. Report and Recommendation of Magistrate Judge

On February 23, 1997, the magistrate judge issued a report and recommendation to grant defendants' motion for summary judgment. Pet.App. 52a. The magistrate judge observed that, whereas defendants' motion was accompanied by a separate statement of material facts not in dispute, supported with affidavits complying with the requirements of Fed.R.Civ.P. 56(e), Kidd's motion and opposition were not so supported. Pet.App. 57a. Specifically, the magistrate judge found that Kidd had failed to comply with Fed.R.Civ.P. 56(c) or (e) or Local Rule 108(h) either in her motion for partial summary judgment or her opposition to defendants' motion. Pet.App. 57a. Citing defendants' Memorandum and its Opposition and Reply, supporting its motion for summary judgment, the magistrate judge found that there was no genuine issue as to any material fact concerning Kidd's nonpromotion, training opportunities, reduced duties, performance evaluations, return to the agency for which she formerly worked, and rights under the Rehabilitation Act. *Id.* The magistrate judge concluded that Kidd's motion and opposition were "almost entirely comprised of her opinions of defendants' actions and characterizations of various statutes and decisions." *Id.* 58a; *see id.* 10a n.1.

6. District Court's Final Order and Kidd's Appeal

On March 20, 1998, the district court issued the order in question, which resolved all of Kidd's remaining claims. It adopted magistrate judge's report and recommendation, granted defendants' motion for summary judgment, and denied Kidd's motion for partial summary judgment. Pet.App. 24a-25a. The order was docketed the same day. *See* Civil Docket, D.C.Cir.App. 46.

On April 30, 1998, Kidd filed a notice of appeal with the D.C. Circuit. Pet.App. 32a. She attached an affidavit implying that she

had not personally received notice of the final order. *Id.* 37a-38a.

7. Decision of D.C. Circuit Dismissing Appeal

A panel majority of the D.C. Circuit dismissed the appeal as untimely since it was filed more than 30 days after the final order of the district court entered on March 20, 1998. The court noted that the time limits established by F.R.A.P. 4(a) are "mandatory and jurisdictional," and observed that Kidd had not attempted to seek an extension of time from the district court for filing her appeal under F.R.A.P. 4(a)(5) or (6). Pet.App. 4a-5a.

The court rejected Kidd's argument that the district court's order failed to satisfy Fed.R.Civ.P. 58 and, thus, that the time for appeal never started running. The court explained that the "separate document" requirement of that rule, based on the Advisory Committee's Note to the 1963 amendment to the rule, "was designed chiefly to distinguish an actual judgment from 'an opinion or memorandum containing some apparently directive or dispositive words'" *(citing* the Note) and, thus, that the court had "understood Rule 58 as requiring that 'the inclusion of legal reasoning and authority' not go to the point of making 'an order into a combined decision and order.'" Pet.App. 5a, *citing Diamond v. McKenzie*, 770 F.2d 225, 230 n.10 (D.C. Cir. 1985). The court acknowledged that Rule 58 must be "mechanically" applied but observed that "it is one thing to say that Rule 58 creates a straightjacket, another to define the straightjacket's precise measurements." Pet.App. 6a. The court concluded that "some explanation [in a final order] is acceptable–so long as it is very sparse" and that "trivial departures [from the official judgment forms, see Fed.R.Civ.P. app. Forms 31, 32] must be tolerated in the name of common sense." Pet.App. 6a-7a, *quoting Diamond*, 770 F.2d at 234.

The court held that the order in question was a Rule 58

judgment because "[a]part from a reference to the motions being decided, and one conclusory sentence of justification, it consists simply of ordering clauses." Pet.App. 7a. The court rejected Kidd's argument that this Court's decision in *Shalala v. Schaefer*, 509 U.S. 292 (1993) stood for the proposition that a district court's adoption of a magistrate judge's report and recommendation violated Rule 58, noting that the issue of the district court's compliance with Rule 58 was not before the Court. Pet.App. 8a.

Judge Tatel dissented, expressing the belief that the district court's order did not qualify as a Rule 58 order, because the order "contained the district court's reasoning." Pet.App.15a. However, he acknowledged that "an order 'does not lose its character as a separate document simply because it includes a one-sentence explanation of what the order is all about, or a recital that a magistrate's report and recommendation are being adopted.'" *Id.* 16a, *quoting Diamond, supra,* 770 F.2d at 234. He argued for a "bright line rule" in which "[o]rders containing the district court's reasoning . . . are not judgment within the meaning of Rule 58." Pet.App.17a.

The D.C. Circuit denied rehearing. Pet.App. 27a. Judge Tatel again dissented in a one-paragraph statement joined by three other judges. Pet.App.30a.

REASONS FOR DENYING THE PETITION

The District Court's order adopting the magistrate judge's report and granting defendants summary judgment as to all remaining claims, which contained no findings, citations, or analysis, complied with the separate document requirement of Fed.R.Civ.P. 58.

The petition presents two distinct questions for this Court's

consideration--namely, whether a district court's dispositive order satisfies the separate document requirement of Fed.R.Civ.P. 58 if it (1) "contain[s] an explanation of the court's reasoning" or (2) "adopt[s] the report and recommendation of a magistrate judge." Pet. i. Kidd's argument, however, conflates these two issues, referring to each as the single "issue" in this case, *see* Pet. 12, and citing authority concerning one issue in support of the other. Although both issues must be considered in light of the purpose of the separate document requirement, they raise different concerns, which we will address separately.

A. The basic purpose of the separate document requirement is to prevent the uncertainty created by a combined decision and order.

The purpose of the separate document requirement is explained in the Advisory Committee Note to the 1963 amendment to Rule 58. The Note states that the requirement was added to Rule 58 in 1963 because of the difficulties arising from the practice of some district courts of combining opinions or memoranda with dispositive orders, which in some cases created doubts as to when the period for noting an appeal started to run, and that:

> The amended rule eliminates these uncertainties by requiring that there be a judgment set out on a separate document--distinct from any opinion or memorandum--which provides the basis for the entry of judgment.

28 U.S.C.A. Fed.R.Civ.P. 58, *Advisory Committee Note*, at 36 (1992). See *United States v. Indrelunas*, 411 U.S. 216, 220 (1973). Thus, the essential purpose of the separate document requirement is to prevent the uncertainty created by a combined decision and order.

B. The D.C. Circuit's holding that the district court's inclusion in its dispositive order of one conclusory sentence of justification did not violate the separate document requirement is consistent with the decisions of all circuit courts that have addressed this issue.

Kidd's first question is whether the district court's inclusion of a sentence "containing an explanation of the court's reasoning" in a dispositive order violates the separate document requirement. The sentence in question reads as follows:

> In her objection, Plaintiff still fails to raise any genuine issues of material fact in this recent filing and does not set forth any arguments that would cause the Court to reject Magistrate Judge Robinson's Report and Recommendation.

Order of March 20, 1998, Pet.App. 24a. As noted, the D.C. Circuit held that it did not, observing, "[a]part from a reference to the motions being decided, and one conclusory sentence of justification, [the order] consists simply of ordering clauses." Pet.App. 7a.

It is an overstatement to describe this sentence as "containing the court's reasoning." The sentence does not purport to give reasons. It makes no mention of any factual issues that Kidd raised or arguments she made, nor does it explain why the court found the facts deficient or her arguments unconvincing. It simply paraphrases the key prerequisites of judgment under Fed.R.Civ.P. 56(c)–namely, that:

> . . . The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together

> with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Therefore, the court's sentence is essentially a statement that there is no basis in the record for not entering summary judgment; it is otherwise contentless.

However, even assuming this sentence contained the court's "reasoning," there is no conflict in the circuits on Kidd's first question. Most of the circuits have not confronted the issue, and this general silence is an indication that the issue is not of widespread concern. Those circuits that have done so agree that the addition of a short explanation in a dispositive order does not violate the separate document requirement. See *Nunez-Soto v. Alvarado*, 956 F.2d 1, 2 (1st Cir. 1992) (addition of single explanatory sentence not sufficient to transform judgment into memorandum or opinion); *Weinberger v. United States*, 559 F.2d 401, 402 and n. 1 (5th Cir. 1977) (order containing a short explanation and citation of authority satisfied Rule 58, observing that just because *Indrelunas* states that Rule 58 is to be "mechanically" applied does not mean that it is to be "mindlessly" applied); *Pacific Employers Ins. Co. v. Domino's Pizza, Inc.*, 144 F.3d 1270 (9th Cir. 1998) (amended judgment satisfied Rule 58 even though it contained references to the district court's proceedings and decisions on motion to alter original judgment); *Hamilton v. Nakai*, 453 F.2d 152, 155 (9th Cir.), *cert. denied*, 406 U.S. 945 (1972); *Diamond v. McKenzie*, 770 F.2d 225, 229-230 (D.C. Cir. 1985).

Dissenting Judge Tatel argues that the number of sentences should not be the test, suggesting that it should make no difference if the sentence in question were divided in two. Pet.App. 15a.

However, the focus of the D.C. Circuit's decision, and that of the decisions of other circuits that have addressed the issue, was not the number of sentences, but the terseness of the language and the absence of facts, law, or analysis.

The Tenth Circuit has not directly addressed the precise issue. *Laidley v. McClain*, 914 F.2d 1386, 1390 (10th Cir. 1990), established that an order complies with Rule 58 if it "contains no discussion of the reasoning behind the court's decision"; "cannot be considered to be an opinion or memorandum"; and "was clearly intended to be the final directive of the court disposing of all the claims." That standard does not preclude the acceptance of an order that contains a single explanatory sentence. Other Tenth Circuit decisions holding that Rule 58 was violated involve much more elaborate orders, which are clearly distinguishable from the order in question. See *Deboard v. Sunshine Mining & Ref. Co.*, 208 F.3d 1228, 1237 (10th Cir. 2000) (6-page order containing legal analysis and reasoning); *Clough v. Rush*, 959 F.2d 182, 185 (10th Cir. 1992) (15-page order).

Kidd also notes that the Second Circuit uniquely requires that a dispositive order be captioned "judgment." See *Cooper v. Town of East Hampton*, 83 F.3d 31, 34 (2d Cir. 1996). The D.C. Circuit and other circuits have rejected this interpretation. *See* Pet.App. 11a n.2 (citing cases). This, of course, is a distinct issue, which petitioner has not raised either in her petition or in the D.C. Circuit. In any case, the order in question expressly grants summary "judgment" to defendants. It should also be noted that Fed.R.Civ.P. 54(a) provides that "'judgment' as used in these rules includes . . . any *order* from which an appeal lies." (Emphasis added.) Pet.App. 1a n.2 (citing cases).

Kidd also relies upon four unpublished circuit court decisions, which she includes in a separate appendix. However, these cases

do not support her position, but undercut it. In *Anderson v. Pierce*, 770 F.2d 165, 1985 WL 12815 (6th Cir. 1985), the court held that an order dismissing plaintiff's suit was not final where the district court's later issuance of another order relating to the case made the finality of the first order questionable--a case clearly distinguishable on the facts. Similarly distinguishable is *Engler v. Township of Spring Valley*, 924 F.2d 1057, 1991 WL 15148 (6th Cir. 1991), which *dismissed* as untimely an interlocutory appeal based on qualified immunity from an order denying defendant's motion for summary judgment despite the fact that the order was "arguably not the kind of separate document contemplated by court rule 58 because it covers a wide variety of separate and independent decisions involved in the ongoing administration of the case and thus cannot be readily identified as a final appealable order within the intent of the court rule." *Id.* at 2. In *Martone v. Connecticut General Life Ins. Co.*, 983 F.2d 1056, 1992 WL 385245 (4th Cir. 1992), the court, contrary to Kidd's position, agreed that "a very brief order can serve as both the court's decision and the formal judgment required by Rule 58," although, under facts distinguishable from the present case, it held that "where, as here, the three page order contains a procedural history of the case and a somewhat lengthy statement of the court's reasoning, it is better classified as the court's opinion than as a Rule 58 judgment order." *Id.* at 2-3 n.2. In contrast, the order in the present case suffers from none of the defects noted by court. In *Woods v. Wal-Mart*, 124 F.3d 219, 1997 WL 527668 (10th Cir. 1997), the court held that a minute order entered on the docket denying plaintiff's motion to remand the case to state court *complied* with the separate document requirement and, hence, her notice of appeal was untimely, although the court excused the untimeliness under the "unique circumstances" doctrine. Again, this case hardly supports Kidd's position that the order in question violated the separate document requirement.

In an attempt to show the presence of "confusion" among the circuits on the issue, Kidd argues that courts have taken different factors into account in determining whether particular orders complied with Rule 58--namely, brevity, extent of citation to authority, legal analysis, and the intent of district court. Pet. 18-27. However, the order in question qualifies under any of these tests. As noted, the single, conclusory sentence contains no facts, law, or analysis. Moreover, the order completely disposes of all of Kidd's remaining claims, expressly granting summary judgment to defendants. It bears no resemblance to a memorandum or decision. Moreover, the order was separate from the district court's Memorandum Opinion, Pet.App. 39a-51a, and from the magistrate judge's Report and Recommendation analyzing the remaining claims, *id.* 52a-59a--both of which, in contrast, did contain detailed findings of fact, numerous citations of legal authorities, and analysis. Finally, it was clear that the district court intended its March 20, 1998 order granting defendants summary judgment as its final order; it issued no more orders in the case after that day.

Under these circumstances, no reasonable person could have been uncertain as to the finality of this. Nor was Kidd confused here; after she became aware of the order, she treated it as final judgment, filing a notice of appeal, although belatedly. As the D.C. Circuit aptly put it, "it is one thing to say that Rule 58 creates a straightjacket, another to define the straightjacket's precise measurements." *Id.* 6a. That court concluded that this was a "trivial departure" from the official judgment forms that "must be tolerated in the name of common sense." *Id.* 7a. The D.C. Circuit's decision is entirely consonant with the primary purpose of the separate document requirement to avoid uncertainties.

Therefore, the first question raised by Kidd has not created a conflict among the circuits or is otherwise of sufficient importance to warrant review by this Court.

C. The D.C. Circuit's holding that the district court's adoption of the magistrate judge's report and recommendation did not violate the separate document requirement is supported by a majority of the circuits that have addressed the issue, and the decisions of three circuits to the contrary all addressed the issue in a very narrow context under unusual circumstances, which are unlikely to recur.

Kidd's second question is whether a dispositive order of a district court that adopts the report and recommendation of a magistrate judge *ipso facto* violates the separate document requirement. This argument ignores the text and history of Rule 58, as well as the reasoned decisions of a majority of the circuits that have considered the issue. Even dissenting Judge Tatel agreed.[7] Although Kidd points to decisions of three circuits as evidence of a conflict, an examination of these cases shows that they concerned a very narrow context under unusual circumstances, which are unlikely to recur.

Kidd's argument assumes that, in order to satisfy this requirement, a district court must always enter two orders of its own and may not treat the report and recommendation as a

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[7]He acknowledged that "an order 'does not lose its character as a separate document simply because it includes a one-sentence explanation of what the order is all about, or a recital that a magistrate's report and recommendation are being adopted.'" Pet.App. 16a.

document from which its order is "separate" under Rule 58. However, this argument is undercut by the text and history of the separate document requirement.

The dictionary definition of the word "separate," as an adjective, includes "existing by itself" and "autonomous." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY at 1067 (10th ed. 1993). In this sense, the phrase "separate document" does not require the existence of another document from which the document must be separate. Similarly, the Advisory Committee Note to the 1963 amendment to Rule 58, *supra*, p.10, explains that the dispositive order must be "distinct from *any* opinion or memorandum" (emphasis added). The word "any" implies that there may not be an opinion or memorandum.

Moreover, the majority of the circuits that have addressed the issue have held that Rule 58 does not require that an order adopting a magistrate's report and recommendation be accompanied by a second order. See *Alman v. Taunton Sportswear Mfg. Corp.*, 857 F.2d 840, 842-843 (1st Cir. 1988); *Ellison v. Conoco, Inc.*, 950 F.2d 1196, 1200-1201 (5th Cir. 1992) ("Rule 58 was designed to function as a life-preserver rather than a heavy anchor"), *cert. denied*, 509 U.S. 907 (1993); *United States v. Perez*, 736 F.2d 236, 237-238 (5th Cir. 1984) ("The mere fact that the first sentence of the order adopts the magistrate's report and recommendation does not require that two documents be used by the district court rather than one"); *Mason v. Groose*, 942 F.2d 515, 516 (8th Cir. 1991), *cert. denied*, 502 U.S. 1039 (1992); *Laidley v. McClain*, 914 F.2d 1386, 1390 (10th Cir. 1990) ("The fact that the first sentence of the order adopted the report of the magistrate does not require that two documents be used instead of one"); *United States v. Clearfield State Bank*, 497 F.2d 356, 358-359 (10th Cir. 1974); *Diamond, supra*, 770 F.2d at 229-230.

Kidd points to three decisions of other circuits–*Kadelski v. Sullivan*, 30 F.3d 399, 400-02 (3d Cir. 1994); *Yang v. Shalala*, 22 F.3d 213, 216 (9th Cir. 1994); and *Newsome v. Shalala*, 8 F.3d 775, 775, 778-80 (11th Cir. 1993)–as evidence that there is a split among the circuits on this question. However, any split is limited in scope and unlikely to recur.

These cases all focused on the narrow issue of the timeliness of an application for attorney's fees under the Equal Access to Justice Act (EAJA) by Social Security claimants who obtained a district court order reversing and remanding an administrative decision under sentence four of 28 U.S.C. § 405(g), where the fee request was required "within thirty days of final judgment in the action," defined as "a judgment that is final and not appealable." 28 U.S.C. § 2412(d)(1)(B), (2)(G).

As the D.C. Circuit explained, these decisions were based on a misreading of *Shalala v. Schaefer*, 509 U.S. 292 (1993). In that case, the Secretary of Health and Human Services had taken the position that it did not really matter whether the separate document requirement was satisfied because a final order "became" appealable despite noncompliance with Rule 58 under the reasoning of *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 385-387 (1978). *See Shaefer*, 509 U.S. at 303. Although the Court rejected the Secretary's reasoning, the parties did not raise, and this Court did not address, the issue of whether a district court's adoption of a magistrate's report and recommendation violated the separate document requirement. Nor did the Court even mention that the order in question adopted a magistrate's report and recommendation. *See* Pet.App. 7a-8a. Moreover, as the D.C. Circuit noted, *Newsome* "explicitly confined its reasoning to Social Security cases in general and more specifically to 'the narrow facts of this case,'" although *Yang* took "no position with regard to this limitation." *Id.* 7a.

A recurrence of factual situations similar to those facing these courts is unlikely. The courts were presented with an unusual situation created by an unforseen change in the law which was especially unfair to claimants. Through no fault of their own, the claimants were caught by this Court's reversal of the commonly accepted view that "sentence four" remand orders were not "final judgments." As *Newsome* explained:

> At the time this litigation was initiated, this circuit treated *all* remand orders from a district court to the Secretary as interlocutory orders, not as final judgments. . . . Thus, it was the district court's order after remand and return of the case from the Secretary that was the "final judgment" for purposes of the EAJA; the thirty days within which a claimant could file an application for attorney's fees under the EAJA began to run when this order became "final and not appealable."
>
> The Supreme Court has put to rest what is a final judgment in a Social Security case like the one before us in its cases of *Sullivan v. Finkelstein*, [496 U.S. 617 (1990)], *Melkonyan v. Sullivan*, [501 U.S. 89 (1991)], and *Shalala v. Schaefer*, [509 U.S. 292 (1991)]. If the district court enters a "sentence four" remand order, that judgment is appealable.

8 F.3d at 777-778 (emphasis in original). Since this Court's clarification of the law occurred after the time had expired under the clarified rules, the claimants were trapped, and the courts had an inducement to find a way out in the interest of fairness.

This situation has not recurred since this Court's clarification that "sentence four" remand orders were "final orders" from which

an appeal lies. Therefore, the apparent conflict between these cases and the decisions of the other five circuits mentioned is more fanciful than real. No other circuits have adopted the reasoning of these three decisions even in the narrow context of the timeliness of EAJA petitions for attorney's fees, let alone has any circuit applied these decisions to other contexts involving the separate document requirement. Therefore, Kidd has only pointed to a narrow and temporary conflict on this issue, one which does not threaten to recur, much less to expand beyond its origins.

Kidd also argues that this case is one of "exceptional importance" because the question of what constitutes a separate document is recurring, and disposition of civil actions on a magistrate's report and recommendation is commonplace. She cites statistics for the proposition that a large number of civil cases are referred to magistrate judges, Pet. 17, although she makes no attempt to estimate the number of cases involving the separate document requirement. However, the fact remains that, whatever the frequency with which this issue might arise, it has not generated conflicting circuit decisions.

Therefore, Kidd's second question, like her first question, does not warrant consideration by this Court.

CONCLUSION

The petition should be denied.

Respectfully submitted,

ROBERT R. RIGSBY,
Corporation Counsel
CHARLES L. REISCHEL,
Deputy Corporation Counsel
LUTZ ALEXANDER PRAGER
Assistant Deputy Corporation Counsel
*JAMES C. MCKAY, JR.,
Senior Assistant Corporation Counsel
Office of the Corporation Counsel, D.C.
441 Fourth Street, NW, 6th floor
Washington, DC 20001
*Counsel of Record

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No. 00-544

IN THE

Supreme Court of the United States

PATRICIA KIDD,

Petitioner,

v.

DISTRICT OF COLUMBIA, *et al.*,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DANIEL G. JARCHO
Counsel of Record
MICHAEL J. HAUNGS
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioner

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ARGUMENT

A. A Direct Conflict Exists Among The Courts Of Appeals On An Important Federal Question

Petitioner has demonstrated that the decision below conflicts directly with decisions of the Third, Ninth and Eleventh Circuits, which hold that an order adopting a magistrate judge's report and recommendation is not a "separate document" under Rule 58, and that entry of such an order does not begin the running of the time for appeal.[1] Respondents cannot and do not deny that a circuit conflict exists. Instead, they counter that the decisions in *Kadelski*, *Newsome* and *Yang* all concerned the timeliness of attorney's fees applications under the Equal Access to Justice Act (EAJA) in Social Security Act cases, and argue that "any split is limited in scope and unlikely to recur." (Br. in Opp. 19.) This argument is wholly unconvincing.

The question under EAJA is when the time for appeal has expired—an issue that can only be resolved by examining whether the trial court entered a "separate document" under Rule 58.[2] Accordingly, the holdings in *Kadelski*, *Newsome* and *Yang* were fundamentally premised upon those courts'

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[1] *See Kadelski v. Sullivan*, 30 F.3d 399 (3d Cir. 1994); *Yang v. Shalala*, 22 F.3d 213 (9th Cir. 1994); *Newsome v. Shalala*, 8 F.3d 775 (11th Cir. 1993).

[2] EAJA provides that an application for attorneys fees must be presented "within thirty days of final judgment in the action . . . ." 28 U.S.C. § 2412(d)(1)(B). "Final" means "not appealable," and thus EAJA requires that a fee application be filed within thirty days "after the time for appeal has ended." *Shalala v. Schaefer*, 509 U.S. 292, 302 (1993) (where no separate document in conformity with Rule 58 was entered, judgment remained "appealable," and application for fees was timely).

application of the separate document requirement under Rule 58. It therefore is of no consequence that those decisions addressed the timeliness of EAJA fee awards, rather than the timeliness of an appeal. Those courts' rulings regarding Rule 58 clash directly with the holding of the court of appeals below. There is no principled basis for limiting those Rule 58 rulings to the EAJA context.

There also is no basis for limiting the applicability of *Kadelski, Newsome* and *Yang* to Social Security cases. Social Security cases are governed by the same rules of civil procedure as other cases, and Respondents fail to explain how a decision construing Rule 58 could be limited to the context of Social Security. In any event, the court below did not distinguish *Kadelski*, *Newsome* and *Yang* as inapplicable. Rather, it recognized that those cases conflicted directly with its own reasoning, and rejected them as incorrect on the merits. (App. 8a.)

Respondents argue that "the majority of the circuits that have addressed the issue" have held that Rule 58 does not require that an order adopting a magistrate judge's report and recommendation be accompanied by a separate judgment document, citing decisions of the D.C., Fifth, Eighth and Tenth Circuits.[3] (Br. in Opp. 18.) But this contention—like

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[3] Respondents rely on the same decisions cited by Petitioner as evidence of the circuit split: *United States v. Perez*, 736 F.2d 236 (5th Cir. 1984), *Mason v. Groose*, 942 F.2d 515 (8th Cir. 1991), and *Laidley v. McClain*, 914 F.2d 1386 (10th Cir. 1990). Respondents also cite *Alman v. Taunton Sportswear Mfg. Corp.*, 857 F.2d 840, 842-43 (1st Cir. 1988), as standing for the proposition that an order adopting a magistrate judge's report and recommendation need not be accompanied by a separate judgment. *Kadelski* cited *Alman* as standing for the same proposition. 30 F.3d at 402. In fact, however, *Alman* makes no reference to any magistrate judge's report and recommendation.

Respondents' argument that they believe *Kadelski*, *Newsome* and *Yang* to be "based on a misreading of *Shalala v. Schaefer*," and hence incorrectly decided—does not prove the absence of a direct circuit split, but rather precisely the opposite. (*See* Br. in Opp. 19.) The fact that four circuits disagree with three other circuits is a compelling reason for the Court to grant review in this case.

Furthermore, the direct conflict between the Third, Ninth and Eleventh Circuits, on the one hand, and the D.C., Fifth, Eighth and Tenth Circuits, on the other, is unlikely to be resolved without this Court's intervention. The split derives in large measure from a fundamental disagreement in the circuits' interpretation of this Court's decision in *Shalala v. Schaefer*. The Third Circuit in *Kadelski* expressly declared the Fifth, Eighth and Tenth Circuit cases to have been overruled by *Shalala v. Schaefer*.[4] The D.C. Circuit below, however, rejected *Kadelski*, *Newsome*, and *Yang* as wrongly decided, professing itself "uncertain how these decisions can be extracted from *Schaefer*." (App. 8a.) In this situation, only this Court can provide adequate guidance on the important question presented.

B. This Case Presents The Court With An Opportunity To Resolve The General Confusion Among The Courts Of Appeals Regarding What Constitutes A Separate Document Under Rule 58

Respondents' opposition does not dispute that the courts of appeals have exhibited considerable confusion regarding the contents of a separate document under Rule 58. In addition to the direct conflict regarding whether an order

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[4] *See Kadelski*, 30 F.3d at 402 (holding *Mason v. Groose*, *Laidley v. McClain*, and *United States v. Perez* to be "no longer controlling in light of *Schaefer*").

adopting a magistrate judge's report and recommendation requires a separate document, circuits have differed more fundamentally on whether compliance with Rule 58 is measured by the brevity of a document, the amount of legal reasoning or citations, or the intent of the district court. Respondents cannot deny that intervention by this Court is needed to establish uniformity.[5]

Respondents address this confusion by noting that (except for the direct conflict described in Section A, *supra*) the different circuits' decisions do not all *directly* conflict, and that other circuits may have reached the same result as the court below, but for different reasons. (Br. in Opp. 14-15.) But this response does nothing to address Petitioner's argument—that confusion and disarray among the circuits requires resolution by this Court.

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[5] Nor have the Judicial Conference Advisory Committees on the Appellate and Civil Rules shown any likelihood of clarifying the required contents of a separate document under Rule 58. The advisory committees recently have proposed amendments to the Federal Rules of Civil Procedure and the Federal Rules of Appellate Procedure, including changes to Rule 58 and to Fed. R. App. P. 4. *See* Memorandum to the Bench, Bar, and Public, Aug. 15, 2000 (available at http://www.uscourts.gov/rules/). But the advisory committees have shown no inclination either to abandon the separate document requirement or to clarify its contents, even though they have acknowledged the judicial confusion noted above.

The Advisory Committee notes state that the "simple requirement" of Rule 58 "has been ignored in many cases," leading to "many and horridly confused problems under Appellate Rule 4(a)." *Id.*, Proposed Amendments to the Federal Rules of Civil Procedure at 15. While clarifying other issues under Rule 58, the proposed rule "preserves the core of the present separate document requirement," and the Committee states that "no attempt is made to sort through the confusion that some courts have found in addressing the elements of a separate document." *Id.* It falls to this Court to resolve that confusion.

Respondents agree that the purpose of the Rule 58 separate document requirement is to provide clarity as to when the time for appeal begins to run. (Br. in Opp. 11.) They do not disagree that such clarity is important, and that there should be national uniformity on Rule 58. Indeed, four judges of the court of appeals below dissented from the denial of rehearing en banc because they found this case to be one of "exceptional importance," in which the panel decision is likely to "produce precisely the kind of uncertainty and potential loss of appeal rights that Rule 58 was intended to prevent." (App. 30a.)

This case presents an opportunity for the Court to clarify the contents of a Rule 58 separate document, and resolve conclusively the confusion in the circuits that has led to the loss of appeal rights in cases such as this one.

C. The Procedural Issues Raised In This Petition Do Not Require Resolution Of The Factual Disputes In The Underlying Case

Respondents devote considerable space to a recitation of their version of the underlying lawsuit, which concerns continued discrimination and retaliation against a District of Columbia civil servant, after a jury held three of her supervisors personally liable for sexual harassment and intentional infliction of emotional distress.[6] (Br. in Opp. 1-7.) Respondents' factual contentions are irrelevant to this petition. The court of appeals did not reach the merits of the district court's grant of summary judgment. The only issue decided by the court below was the timeliness of the appeal, and that

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[6] The decision of the District of Columbia Court of Appeals in Ms. Kidd's original litigation against the District of Columbia provides an extensive description of the underlying facts. *See King v. Kidd*, 640 A.2d 656 (D.C. 1993).

is the only issue before the Court on this petition. Although the propriety of the district court's grant of summary judgment would have to be resolved by the court of appeals on remand from any decision of this Court, this petition presents the Court with an opportunity to address and clarify the requirements of Rule 58, without any need to address the factual record in this case.

Respondents' "Counter-Statement of the Case" erroneously presents Respondents' factual arguments as though they were the findings of the court below. Respondents rely on several affidavits that they submitted at the summary judgment stage. (Br. in Opp. 2-4.) But Petitioner submitted extensive evidence contradicting those affidavits. (*See* App. 20a-21a.) The only judge of the court of appeals below to address the merits of the grant of summary judgment, Judge Tatel in dissent, agreed with Petitioner that disputed issues of material fact required reversal of the grant of summary judgment, and had "no doubt the case should have gone to a jury." (App. 21a.)

In addition, Respondents' characterization of the record below is erroneous. For example, Respondents argue that "although technically *pro se*, Kidd was represented by six lawyers during her litigation in the district court." (Br. in Opp. 5.)[7] In fact, although the district court made several unsuccessful attempts to appoint counsel, it is undisputed that Ms. Kidd ultimately litigated her case *pro se*, and that she was proceeding without counsel at the time that the district court entered the order that is the subject of this petition. (App. 3a.)

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[7] To the extent that Respondents are suggesting that Petitioner was a "difficult" litigant, there is no factual support for such a proposition in the record. In addition, such an issue is of course irrelevant to this Petition.

Respondents also quibble with the proposition that upon returning to work after her successful trial against Respondents, Ms. Kidd was placed under the supervision of the same individuals found personally liable to her. (Br. in Opp. 3 & n.3.) They argue that the supervisor who had sexually assaulted her no longer had daily interaction with her, and that another supervisor found liable to her for intentional infliction of emotional distress "distanced himself from matters involving Kidd and eventually left the District Government," although they acknowledge that he was still "in the chain of command." (Br. in Opp. 3 & n.3.) But this supervisor had *never* been Ms. Kidd's "direct" supervisor, and had only been "in the chain of command" at the time when a jury determined that he had intentionally inflicted emotional distress by abusing his supervisory authority, colluding with Ms. Kidd's harasser, and retaliating against her. *See King v. Kidd*, 640 A.2d at 674-75. In fact, the record indicates that this individual, as well as another supervisor found liable to Ms. Kidd, took part in the decision to deny her a promotion, even though they were jointly and severally liable to her for nearly $300,000 in compensatory and punitive damages at the time they made that decision. (D.C. Cir. App. 376-77; *see* App. 19a.)

CONCLUSION

For the reasons stated above, and in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

DANIEL G. JARCHO
Counsel of Record
MICHAEL J. HAUNGS
McKENNA & CUNEO, L.L.P.
1900 K Street, N.W.
Washington, D.C. 20006
(202) 496-7500

Counsel for Petitioner

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